



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>KRIS MAYES ATTORNEY GENERAL</p> <p>January 26, 2024</p>	<p>No. I24-002 (R23-022)</p> <p>Re: Appointments to the Arizona Clean Elections Commission under A.R.S. § 16-955</p>
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To: The Honorable Katie Hobbs
Governor, State of Arizona
1700 W. Washington Street
Phoenix, Arizona 85007

The Honorable Kimberly Yee
Treasurer, State of Arizona
1700 W. Washington Street
Phoenix, Arizona 85007

Question Presented

The last appointment to the Citizens Clean Elections Commission (“Commission”) was in 2017. You have asked us to analyze how new appointments to the Commission should be made—and, in particular, whether appointments should alternate strictly between appointing officials in different political parties, or if appointments should instead alternate between the governor and the highest-ranking official holding a statewide office who is not a member of the same political party as the governor.

Summary Answer

Because A.R.S. § 16-955(D) provides that “the governor and the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall”

make alternating appointments to the Commission, the alternation sequence must include the governor. Given the holdover status of the full current Commission, the Attorney General’s Office (“Office”) agrees that Governor Hobbs and Treasurer Yee may (and should) appoint new Commissioners to all five Commission seats without further delay. Based on the established alternation cycle, the Governor is presently entitled to appoint a new Commissioner for the term starting February 1, 2024. Additionally, the Governor and the Treasurer are each entitled to appoint successors for two other holdover Commissioners, with the new appointees’ terms ending in accordance with the staggered-term cycles for their respective seats.

Background

A. A five-member Commission administers Arizona’s Clean Elections program.

In 1998, Arizona voters passed Proposition 200, The Citizens Clean Elections Act (“Clean Elections” or the “Act”).¹ The Act’s “purpose . . . [was] to restore citizen participation and confidence in our political system, improve the integrity of Arizona State government and promote freedom of speech under the U.S. and Arizona Constitutions.” (Citizens Clean Elections Commission, *What We Do*.²) Consistent with these objectives, the Act “established a system for voter education, clean funding for candidate campaigns and campaign finance enforcement.” (*Id.*)

A five-member, non-partisan Commission administers the Clean Elections program. A.R.S. § 16-955(C). In 1999, Arizona officials appointed five initial Commissioners for staggered term-lengths, such that one Commissioner was replaced in 2000, the next was replaced in 2001, and so on. A.R.S. § 16-955(C), (D). Beginning with the first replacement in 2000, all subsequent Commissioners have been appointed for five-year terms. A.R.S. § 16-955(D).

¹ See <https://apps.azsos.gov/election/1998/Info/PubPamphlet/prop200.html>.

² <https://www.azcleelections.gov/what-we-do>.

Commissioners may “serve no more than one term and [are] not eligible for reappointment.” A.R.S. § 16-955(I). Since 2018, however, Commissioners have not been replaced as their five-year terms have ended; instead, they have remained on the Commission on a holdover basis. As of January 2024, four Commissioners are therefore serving in a holdover term and one is in a second holdover term. (*See* Citizens Clean Elections Commission, *Our Team*;³ 12/22/23 Hobbs Letter to Yee (“12/22/23 Letter”).⁴)

B. Governor Hobbs and Treasurer Yee disagree about how to make new appointments to the Commission to replace the holdover Commissioners.

The Clean Elections Act provides that “the governor and the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall alternate filling [Commission] vacancies.” A.R.S. § 16-955(D). Governor Hobbs and Treasurer Yee both want to make appointments to the Commission in accordance with law, but they disagree about how to do so.

In a December 20, 2023 letter to the Governor, the Treasurer characterized the Clean Elections law as requiring “the political parties to alternate in making these appointment selections.” (12/20/23 Yee letter to Hobbs (“12/20/23 Letter”).⁵) Because Governor Hobbs, a Democrat, had made the last appointment in 2017 while serving as Senate Minority Leader, Treasurer Yee believed that the Treasurer was “entitled to appoint three out of the next five selections as the highest-ranking Republican elected official in Arizona.” (*Id.*) Under the Treasurer’s proposal, the slate of three Republican appointees and two Democratic appointees

³ <https://www.azcleelections.gov/our-team>.

⁴ <https://www.azag.gov/sites/default/files/docs/sgo/12-22-23%20Governor%20Hobbs%20Letter%20to%20Treasurer%20Yee%20Regarding%20CCEC.pdf>.

⁵ <https://www.azag.gov/sites/default/files/docs/sgo/12-20-2023%20Treasurer%20Yee%20Ltr%20to%20Gov.%20Hobbs%20re%20CCEC.pdf>.

would serve for five years, with the Democrat receiving three appointments in the next five-year cycle. (*Id.*)

Governor Hobbs responded that “the law is more nuanced than simply prescribing alternating appointments based on political party.” (12/22/23 Letter.) Citing A.R.S. § 16-955(D), the Governor understood the law to require appointment authority to “alternate between the Governor and the highest ranking statewide official who is not a member of the Governor’s party.” (*Id.*) Further, based on case law, the Governor understood that newly appointed Commissioners could not serve full five-year terms, but could instead serve only the remainder of the holdover terms they step into. (*Id.*)

On December 28, 2023, the Governor requested an Attorney General Opinion pursuant to A.R.S. § 41-193(A)(7) regarding whether “whether A.R.S. § 16-955 requires the appointment process and alternation of appointing authority” recited in her December 22 letter. (12/28/23 Dul email to Mayes, et al.⁶)

On January 2, 2024, the Treasurer informed the Office that she agreed an Opinion would be beneficial and wanted to ensure that it would be “precisely tailored to the issues at hand.” (1/2/24 Yee letter to Mayes and Bendor (“1/2/24 Letter”).⁷) In particular, the Treasurer clarified that she now agrees that newly appointed Commissioners should not “receive full five-year terms, but [should instead] only fill the remaining terms of [C]ommissioners whose terms have expired.” (*Id.*) The Treasurer also acknowledged that A.R.S. § 16-955(D) provides for alternating appointments by the governor and the highest-ranking official from a different political party. (*Id.*) However, the Treasurer nonetheless still contends that appointments based on alternating party

⁶ https://www.azag.gov/sites/default/files/2024-01/2023-12-28%20Opinion%20Request%20%28Via%20Email%29_Redacted.pdf.

⁷ <https://www.azag.gov/sites/default/files/docs/sgo/CCEC%20Letter-FINAL.pdf>.

affiliation are appropriate “based on (1) the original appointment structure in § 16-955(C), (2) the intent of the statu[t]e, and (3) the history of previous appointments.” (*Id.*)

The Office issues this Opinion pursuant to A.R.S. § 41-193(A)(7), at the request of the Governor and the Treasurer.

Analysis

I. Commission appointments must alternate annually between the governor and the highest-ranking state official in a different political party.

The Act does not prescribe a specific procedure to address the replacement of a Commissioner serving a holdover term. The Office nonetheless agrees with the Governor and the Treasurer that holdover Commissioners should be replaced and annual appointments should resume in a manner that adheres as closely as possible to the general appointment process established by statute. *See Graham v. Lockhart*, 53 Ariz. 531, 534–35 (1939) (where a statute establishes a process for “regular appointments” to a commission, vacancies after the expiration of a term should be filled in accordance with that process, not pursuant to Ariz. Const. art. V, § 8).

While the Governor and Treasurer initially disagreed about multiple issues, the Treasurer’s most recent correspondence indicates that their disagreement now centers on how the alternating annual appointment authority under § 16-955(D) should operate.

A. Section 16-955(D) provides that the governor, irrespective of political party, is entitled to make alternating Commission appointments.

Under the Act, the governor and other state officials populated the first five-member Commission with alternating selections in 1999. A.R.S. § 16-955(C).⁸ Although these initial

⁸ Section 16-955(C) established the following selection sequence: (1) selection by the governor; (2) selection by the highest-ranking statewide official not in the governor’s political party; (3) selection by the second-highest-ranking statewide official in the governor’s party; (4) selection by the second-highest-ranking statewide official not in the governor’s party; and (5) selection by the third-highest-ranking statewide official in the governor’s party.

Commissioners were appointed in the same year, their respective initial terms were staggered to end between January 31, 2000 and January 31, 2004. *Id.* Thereafter, as each initial term ended, subsequent Commissioners were to be appointed for five-year terms, establishing a cycle in which one Commissioner would be replaced every calendar year, after having served for five years. A.R.S. § 16-955(D).

The annual appointment process from 2000 onward differs from the initial appointment process. The Act first required the “vacancy in the year 2000 [to] be filled by the governor.” A.R.S. § 16-955(D). Then, the Act provides that “the governor and the highest-ranking official holding a statewide office who is not a member of the same political party as the governor shall alternate filling such [annual] vacancies.” *Id.* Thus, if the Governor makes an appointment one year, the following year’s appointment should be made by the highest-ranking elected official from a different political party; and then the Governor should make the next appointment, and so on.

The Office next considers whether factors outside the statutory text might bear on our statutory interpretation.

B. Extrinsic considerations do not support alternation by political party.

The Treasurer has suggested to the Office that § 16-955(D) provides for alternation based on the appointer’s political party on three bases, starting with “the original appointment structure in § 16-955(C).” (1/2/24 Letter.)

But §§ 16-955(C) and 16-955(D) are different provisions for different purposes. (*See* 1/2/24 Letter at 2 n.2 (acknowledging that “the first five Commissioner selections had a specific process set forth in [the] statute that differed from that set forth in A.R.S. § 16-955(D)”). Under the initial appointment process, the original appointments were made within a single calendar year by multiple officials, including “the third-highest-ranking” state official. A.R.S. § 16-955(C). Section 16-955(D), in contrast, expressly provides for future appointments to alternate with a

selection by the “governor” every other year. The initial appointment process therefore does not inform our understanding of the annual appointment process in any meaningful way.⁹

The Treasurer also suggests that § 16-955(D)’s “intent” was for appointment authority to alternate based strictly on political party. But as Arizona courts have often stated, “any case involving statutory interpretation . . . begin[s] with the text of the statute,” and “[w]hen the plain text of a statute is clear and unambiguous there is no need to resort to other methods of statutory interpretation to determine” intent. *State v. Christian*, 205 Ariz. 64, 66 ¶ 6 (2003); *State v. Holle*, 240 Ariz. 300, 302 ¶ 11 (2016) (same).¹⁰ Section 16-955(D)’s plain text calls for alternation between the governor and another elected official from a different political party. While these appointments will generally result in party alternation as a natural consequence of following the statutory text, interpreting § 16-955(D) to *require* party alternation would effectively create a different statute altogether.

Further, statutory fidelity is not at odds with the Commission’s bipartisan mission. To the contrary, the Act also provides that “[n]o more than two members of the commission shall be members of the same political party.” A.R.S. § 16-955(A). Thus, even if the timing of a gubernatorial election aligns to give elected officials belonging to the same political party consecutive appointments, that party cannot, in any event, “stack” the Commission with a majority of appointees from a single political party. Rather, each appointer, regardless of party affiliation,

⁹ While not a material factor in this Opinion, the original appointment structure in § 16-955(C) militates, if at all, towards the view that the governor receives a measure of deference in constituting the Commission, insofar as the governor and members of her political party selected three of the five original Commissioners.

¹⁰ Or, as Justice Bolick recently opined in a concurring opinion joined by three other Justices, the words in a statute are not “evidence of” intent; rather “[t]hey are the law.” *State ex rel. Arizona Dep’t of Revenue v. Tunkey*, 254 Ariz. 432, 437 ¶¶ 25-26 (2023) (internal quotation marks omitted) (Bolick J., concurring).

must select new appointees based on the party affiliation (and county of residence) of the four continuing Commissioners. *Id.* Appointments from outside the appointer’s political party have therefore been common throughout the Commission’s history and will necessarily remain so. (See Citizens Clean Elections Commission, *Former Commissioners*.¹¹)

The Treasurer also points to “the history of the Commission selection process” as support for her contention that appointment authority should alternate based strictly on the political party. (1/2/24 Letter.) But as discussed above, alternation between the governor and the highest-ranking official from a different party will generally result in party alternation; it is therefore not surprising to see appointments alternate by party when they are made as the law requires.

There appear to be two potentially anomalous appointment sequences in the Commission’s history—in 2002-03, two different governors belonging to different political parties made consecutive appointments; and then in 2008-09 two different non-governors in different political parties made consecutive appointments. (See 1/2/24 Letter.) But irrespective of the rationale for these sequential variances, Arizona courts “cannot disregard [a] statute’s plain language in deference to” even a “common practice” that deviates from statutory text. *Secure Ventures, LLC v. Gerlach in & for Cnty. of Maricopa*, 249 Ariz. 97, 101 ¶ 11 (App. 2020). Because the controlling statute here provides that the governor is entitled to an appointment every other year—and two potentially anomalous sequences do not amount to a “common practice,” in any event—the statutory text is conclusive.¹²

¹¹ <https://www.azcleanelections.gov/former-commissioners>.

¹² Because the governor made the first appointment in 2000, the governor thereafter would have made appointments in every even year if the alternation sequence had proceeded without variance. Because of the two deviations (in 2002-03 and 2008-09), the governor’s appointments are again in even years.

II. As of February 1, 2024, the Commission should include three Commissioners appointed by the Governor and two Commissioners appointed by the Treasurer.

The Office’s disposition of the appointing-authority question in Section I should facilitate the timely appointment of new Commissioners, as follows.

A. It is the Governor’s sequential turn to make the scheduled 2024 appointment.

Protracted holdover service generally should never occur because the Act provides that the governor and another official “*shall* alternate filling . . . vacancies” on the Commission. A.R.S. § 16-955(D) (emphasis added). But if an official who is required to make an appointment for a particular seat on the Commission fails to do so—and if the Commissioner previously appointed to that seat continues to serve in a holdover capacity—then that official, or his or her successor if the official leaves office without having made an appointment, should appoint a replacement for the holdover Commissioner.

If previous officials had made appointments as scheduled from 2018-2023, the responsibility for making an appointment to the Commission in 2024 would belong to the Governor in the alternating cycle. Or, viewed from a slightly different perspective, Governor Brewer appointed Commissioner Damien Meyer for the 2014-19 term; thus, in the alternating cycle, a non-governor official would have filled the 2019-24 term, and it is now the Governor’s turn again to fill the 2024-29 term for that seat—and therefore, as of February 1, 2024, to fill three of the five seats overall. *See infra* p. 10, Commission Appointments Cycle Chart.

B. New appointees should serve out the remaining term in their appointment cycle, not a full five years.

The Office agrees that new Commissioners should serve for the remaining terms of the respective holdover Commissioners they replace, not for full five-year terms. *Graham*, 53 Ariz. at 537 (“Since the term of an office is distinct from the tenure of an officer, the term of office is

not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term, but merely shortens the term of his successor.”) (internal quotation marks omitted). For clarity, the Office expects that the appointments and staggered term lengths will proceed as follows:

Commission Appointments Cycle

Commissioner	Appointing Authority at Term Start	Term Start	Term End	Appointer After Term End	Following Term End	Appointer After Following Term End	Next Term End	Appropriate Appointer as of 1/31/24 (appointer also <i>indicated in bold italics</i>; future term end dates in bold)
Mark Kimble (I, Pima)	Non-Governor (Senate Minority Leader) - D	2/1/15	1/31/20	Governor	1/31/25	Non-Governor (2/1/25)	1/31/30	Gov. appoints Kimble’s successor
Galen Paton (R, Pima)	Governor - R	2/1/16	1/31/21	Non-Governor	1/31/26	Governor (2/1/26)	1/31/31	Treas. appoints Paton’s successor
Amy Chan (R, Maricopa)	Non-Governor (Senate Minority Leader) - D	2/1/17	1/31/22	Governor	1/31/27	Non-Governor (2/1/27)	1/31/32	Gov. appoints Chan’s successor
Steve Titla (D, Gila)	Non-Governor (Senate Minority Leader) – D	2/1/13	1/31/18	Governor	1/31/23	Non-Governor	1/31/28	Treas. appoints Titla’s successor
Damien Meyer (D, Maricopa)	Governor - R	2/1/14	1/31/19	Non-Governor	1/31/24	Governor	1/31/29	Gov. appoints Meyer’s successor

Thus, the Governor shall appoint replacements for holdover Commissioners Kimble, Chan, and (for the term beginning February 1, 2024) Meyer. The Treasurer—as the highest-ranking elected statewide official of a different party than the governor—shall appoint successors for

holdover Commissioners Paton and Titla.¹³ And as should be clear, the balance of a 3-2 governor/non-governor appointment majority is purely a matter of timing within the alternation cycle. In 2025, of course, the appointment balance will shift back again when an official other than the Governor (presumably still the Treasurer) selects the next appointee.

Conclusion

Section 16-955(D)'s plain text compels the conclusion that Commission appointments must alternate between the governor and the highest-ranking statewide elected official who is not in the Governor's party. Thus, within the standard appointment cycle, the Governor is presently entitled to three appointments and the Treasurer is entitled to two appointments, with the appointees' respective terms to end in accordance with the regular staggered term cycles.

Kris Mayes
Attorney General

¹³ These appointments must comply with other provisions of law, including that “[n]o more than two members of the commission shall be members of the same political party,” “[n]o more than two members of the commission shall be residents of the same county,” and “in the previous five years in this state,” no member may have “been appointed to, been elected to or run for any public office, including precinct committeeman, or served as an officer of a political party.” A.R.S. § 16-955(A), (B). For purposes of complying with these provisions, the Governor and Treasurer should assume that the full Commission is vacant (because all of its members are holdovers who are about to be replaced) and make their respective appointments in sequential fashion. The sequence should follow the order illustrated in the chart, starting with Kimble's replacement and concluding with Meyer's replacement.