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May 24, 1990

J. Edward Hamrick, III, Director
West Virginia Department of
Natural Resources
Capitol Complex, Building 3
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Hamrick:

You have requested a formal opinion of this office pertaining to a grant agreement entered into between the Department of Natural Resources and the City of Kenova pursuant to W. Va. Code § 20-5F-5a(h)(3).

Your letter stated that the purpose of the grant, which came from the Solid Waste Reclamation and Environmental Response Fund created by W. Va. Code § 20-5F-5a(h)(3), was to provide funds for the clean-up of an illegal dump within the Kenova city limits. Upon satisfactory completion of the project, a transmittal was forwarded to the State Auditor's office for release of the funds. However, pursuant to W. Va. Code § 5-10-33, the Auditor held the transmittal and prepared a check to the Public Employees Retirement System (PERS) in payment of the City's delinquent retirement account.

Specifically, you posed the following questions:

1. Was this grant seized contrary to Code?
2. If the City of Kenova is found to be ineligible to receive this grant, should not the funds be returned to the Department of Natural Resources to be used for the purposes specified by 20-5F-5a?

In creating the Solid Waste Management Act, the West Virginia Legislature found that:

uncontrolled, inadequately controlled and improper collection, transportation, processing and disposal of solid waste (1) is a public nuisance and a clear and present danger to people; (2) provides harborages and breeding places for disease-carrying, injurious

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insects, rodents and other pests harmful to the public health, safety and welfare; (3) constitutes a danger to livestock and domestic animals; (4) decreases the value of private and public property, causes pollution, blight and deterioration of the natural beauty and resources of the state and has adverse economic and social effects on the state and its citizens; (5) results in the squandering of valuable nonrenewable and nonreplenishable resources contained in solid waste; (6) that resource recovery and recycling reduces the need for landfills and extends their life; and that (7) proper disposal, resource recovery or recycling of solid waste is for the general welfare of the citizens of this state.

W. Va. Code § 20-5F-1(b) (1989).

To help combat this problem, the Legislature created a solid waste assessment fee. W. Va. Code § 20-5F-5a. This fee was in addition to all other fees and taxes paid by the operator or owner of a solid waste disposal facility.

The proceeds from the solid waste assessment fee are dedicated as outlined in W. Va. Code § 20-5F-5a(h). Essentially, the proceeds were to be dedicated as follows:

(a) The first twenty-five cents per ton of the assessed fee is deposited in the "Solid Waste Reclamation and Environmental Response Fund."

(b) The first fifty thousand dollars of the remaining net proceeds was transferred to the Public Service Commission.

(c) The next one million dollars of the net proceeds in each fiscal year is deposited in the "Solid Waste Enforcement Fund."

(d) The next two hundred fifty thousand dollars of the net proceeds each fiscal year is deposited in the "Resource Recovery-Solid Waste Disposal Authority Reserve Fund."

(e) The remainder of the net proceeds (if any) is to be allocated by the Director of the Department of Natural Resources between the funds noted in (a), (c) and (d) above so as to maintain a reasonable balance in each account.

In establishing the three special revenue accounts noted above, the Legislature also provided for disbursement from those accounts. West Virginia Code §§ 20-5F-5a(h)(1), (2) and (3) (1989) provide:

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(1) The "Solid Waste Enforcement Fund" . . . shall be expended by the director of the department of natural resources for administration, inspection, enforcement and permitting activities established pursuant to this article;

(2) The "Resource Recovery -- Solid Waste Disposal Authority Reserve Fund" . . . shall be exclusively dedicated to providing a reserve fund for the issuance and security of solid waste disposal revenue bonds issued by the resource recovery -- solid waste disposal authority pursuant to article twenty-six [§ 16-21-1 et seq.], chapter sixteen of this code;

(3) The "Solid Waste Reclamation and Environmental Response Fund" . . . may be expended by the director of the department of natural resources for the purposes of reclamation, clean-up and remedial actions intended to minimize or mitigate damage to the environment, natural resources, public water supplies, water resources and the public health, safety and welfare which may result from open dumps or solid waste not disposed of in a proper or lawful manner. (Emphasis added.)

In W. Va. Code §§ 20-5F-5a(h)(1) and (2) the Legislature enumerated purposes for which the Solid Waste Enforcement Fund and the Resource Recovery -- Solid Waste Disposal Authority Reserve Fund shall be used. Conversely, however, W. Va. Code § 20-5F-5a(h)(3) provides that the Solid Waste Reclamation and Environmental Response Fund may be expended for certain specified purposes. The use of the word "may" in § 20-5F-5a(h)(3) was not inadvertent but purposeful on the part of the Legislature and thus reflects legislative intent, "may" being indicative of discretion and "shall" of a mandatory duty.¹ Therefore, monies from the Solid

¹It is commonly accepted that the term "may" in a statute is generally construed as discretionary or permissive, United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445, 1453 (4th Cir. 1985); Sheftic v. Boles, 295 F. Supp. 1347, 1348 (N.D. W. Va. 1969); Hodge v. Ginsberg, ___ W. Va. ___, 303 S.E.2d 245, 250 (1983), while use of the word "shall" in a statute, in absence of language showing contrary intent on the part of the Legislature, should be afforded a mandatory connotation. Rogers v. Hechler, ___ W. Va. ___, 348 S.E.2d 299 (1986); Underwood v. County Comm'n of Kanawha County, ___ W. Va. ___, 349 S.E.2d 443 (1986); State ex rel. R.C.F. v. Wilt, 162 W. Va. 424, 252 S.E.2d 168 (1979); Terry v. Sencindiver, 153 W. Va. 651, 171 S.E.2d 480 (1969). "In determining whether a statute is mandatory or directory, the

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Waste Enforcement Fund and the Resource Recovery -- Solid Waste Disposal Authority Reserve Fund must be used for only those purposes enumerated in the statute; the Director has no discretion as to the manner in which those funds may be spent. However, the Director does have some discretion with the monies in the Solid Waste Reclamation and Environmental Response Fund (at issue here), as those funds may be expended for purposes other than "reclamation, clean-up and remedial actions" pertaining to "open dumps or solid waste not disposed of in a proper or lawful manner."²

As we understand it, the funds provided to the City of Kenova for the clean-up of an illegal dump within its city limits were through a grant from monies held in the Solid Waste Reclamation and Environmental Response Fund. It was against this grant money that the Auditor, under W. Va. Code § 5-10-33, held the transmittal and provided a check to PERS in payment of the City's delinquent retirement account.

West Virginia Code § 5-10-33(b) (1990) states:

If any participating public employer, other than the state, fails to make any payment due the retirement system for a period of sixty days after the payment is due, the participating public employer shall become delinquent, and such delinquency shall be certified to the state auditor by the board of trustees. If any participating public employer becomes delinquent, as provided herein, the state auditor is authorized and directed to withhold any money due such participating public employer by the state until such delinquency, together with regular interest thereon, from the date due, is satisfied. Such money so withheld by the state auditor shall be paid to the retirement system. (Emphasis added.)

Although many would focus upon the word "any" in this statute, and therefore assume that any funds, regardless of their source or

legislative intent is dominant and therefore the language used in expressing that intent is a reliable guide." Brannon v. Perkey, 127 W. Va. 103, 112, 31 S.E.2d 898, 903 (1944).

²Although we believe it beneficial to outline the limitations on these funds, our final answers to the questions you have posed are not based upon the fact that monies out of two of these funds are specifically designated while the director has discretionary authority over the monies in the third fund.

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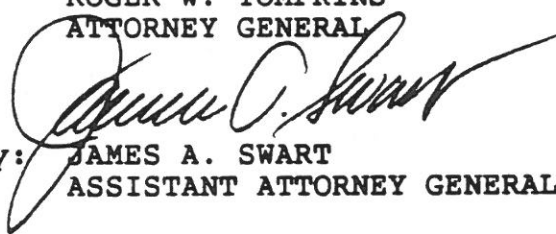
designated purpose, may be withheld by the Auditor and transferred to PERS, it is our opinion that the dispositive word in the statute as it relates to your inquiry is the word "due", as this places limitations on what monies may be attached and re-routed. Webster's Ninth New Collegiate Dictionary (1984) gives the preferable definition of "due" as something "owed or owing as a debt." Therefore, it is our opinion that the use of "due" in W. Va. Code § 5-10-33(b) (1990) implies payments from the State to the non-state participating employer that the State is required to make, such as the allocation of the coal severance tax, wine tax, utility tax or other taxes, fees or assessments whereby the State serves as the central collector and collections are then distributed to local public entities. It is our opinion that "due" does not include monies provided to a non-state participating employer that are not actually owed to them, but are provided through an exercise of discretion to be used for a designated purpose or purposes.

Such would also be the case with federal monies granted to or given the State for designated purposes or for local usage. That type of monetary allocation would not be monies "due" the non-state public participating employer as envisioned by W. Va. Code § 5-10-33(b) (1990).

In summary, it is our opinion that the grant money was seized contrary to the intent of the Legislature in enacting W. Va. Code § 5-10-33(b) (1990) as it was not money due the City of Kenova, but was money provided at the discretion of the Director and for a specified purpose. We are further of the opinion that the Public Employees Retirement System should refund that money to the Department of Natural Resources for use as designated by W. Va. Code § 20-5F-5a(h)(3) (1989), including a grant to the City of Kenova.

Very truly yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL


By: JAMES A. SWART
ASSISTANT ATTORNEY GENERAL

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