



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

April 6, 2016

(304) 558-2021
Fax (304) 558-0140

Mark Holstine, P.E.
Executive Director
Solid Waste Management Board
601 57th Street, S.E.
Charleston, WV 25304

Dear Mr. Holstine:

You have asked on behalf of the West Virginia Solid Waste Management Board (SWMB) for an Opinion of the Attorney General regarding whether a county solid waste authority is considered a "state agency," such that the authority may be required to follow "state policies and procedures, such as purchasing." This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . any other state officer, board or commission." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General's Office.

Your letter raises the following legal question:

Are county solid waste authorities state agencies, such that they should follow state policies and procedures, such as purchasing rules?

In your letter, you state that "[i]t is the SWMB's contention that the county authorities are state entities, and thus, must adhere to applicable state policies and procedures." Quoting from *Blower v. West Virginia Educational Broadcasting Authority*, 182 W. Va. 528, 389 S.E.2d 739 (1990), you assert that "[t]he West Virginia Supreme of Appeals has established that in 'determining whether a particular organization is a state agency, we have examined its legislative framework.'" County solid waste authorities, your letter goes on to claim, satisfy the *Blower* factors and thus "are also 'state agencies.'"

After a careful review of the relevant statutes and case law, we do not believe we can answer whether, in all circumstances, county solid waste authorities are "state agencies" and must follow "state policies and procedures." The Legislature has the authority to statutorily define the concept of a "state agency" differently in different contexts, and to dictate as it sees fit

which particular entities are covered by which state policies or procedure. For example, the state purchasing laws specifically provide that they apply to “spending units of state government,” a term that has a particular statutory definition. W. Va. § 5A-3-1(c); *see also id.* § 5A-1-1(21) (defining “spending unit”).

While your letter suggests that the West Virginia Supreme Court of Appeals set forth a general test for state agency status in *Blower v. West Virginia Educational Broadcasting Authority*, 182 W. Va. 528, 389 S.E.2d 739 (1990), we do not read that case to go so far. In *Blower*, the Supreme Court of Appeals was faced with a very specific certified question: “whether the West Virginia Educational Broadcasting Authority (EBA) is a state agency and thus subject to the special venue provisions of W. Va. Code, 14-2-2(a)(1) (1976).” *Id.* at 529, 389 S.E.2d at 740. Noting that it had “not previously had occasion to formulate a test on what constitutes a state agency under W. Va. Code, 14-2-2,” the court looked to previous cases that “dealt with what is a state agency for purposes of determining whether the entity is entitled to constitutional immunity.” *Id.* at 530, 389 S.E.2d at 741. It then borrowed from those cases a multi-factor test, explaining that it saw “no reason why the same test should not apply to determine whether an organization is a state agency for purposes of the venue provisions of W. Va. Code, 14-2-2.” *Id.* at 530-31, 389 S.E.2d at 741-42. Thus, as the court has said since *Blower*, we believe that the case only “set forth a test for determining whether an entity is a ‘state agency’ for purposes of West Virginia Code § 14-2-2.” *State ex rel. W. Va. Real Estate Appraiser Licensing & Certification Bd. v. Chiles*, 234 W. Va. 125, 128, 763 S.E.2d 663, 666 (2014).

Not only has the Supreme Court of Appeals never suggested that the *Blower* test answers for all purposes whether an entity is a state agency, it has only applied the test in a few specific contexts. *First*, the test has been applied to determine whether an entity is a state agency for purposes of the special venue provisions of West Virginia Code § 14-2-2, as in *Blower* itself. *See, e.g., Chiles*, 234 W. Va. at 128, 763 S.E.2d at 666; *State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 434, 533 S.E.2d 362, 366 (2000); *State ex rel. W. Virginia Bd. of Educ. v. Perry*, 189 W. Va. 662, 664 n.1, 434 S.E.2d 22, 24 n.1 (1993). *Second*, the test has been applied to determine whether an entity is a state agency for purposes of sovereign immunity, as in the cases on which *Blower* was based. *See, e.g., Arnold Agency v. W. Virginia Lottery Comm’n*, 206 W. Va. 583, 592, 526 S.E.2d 814, 823 (1999). *Third*, the test has been extended in one case to determine whether the Secondary Schools Athletic Commission (SSAC) constitutes a state agency against which attorney’s fees could be awarded. *Mayo v. W. Virginia Secondary Sch. Activities Comm’n*, 223 W. Va. 88, 94-97, 672 S.E.2d 224, 230-33 (2008); *see also Chiles*, 234 W. Va. at 130 n.9, 168 S.E.2d at 668 (“Although the issue of ‘state agency’ in *Mayo* pertained to an award of attorney’s fees, rather than venue, the *Blower* test was applied.”). We do not understand your letter to be asking about the state agency status of county solid waste authorities in any of these circumstances, and therefore do not undertake a *Blower* analysis.*

* We do note that, in any event, the *Blower* factors do not point clearly in one direction. The first *Blower* factor favors a finding that county solid waste authorities are state agencies because the powers of county solid waste authorities were “substantially created by the legislature.” Syl. Pt. 1, *Blower*, 182 W. Va. 528, 389 S.E.2d 739; *see W. Va. Code* § 22C-4-1, *et seq.* (establishing county solid waste authorities and their powers and duties); *Warner*, 198 W. Va. at 669, 482 S.E.2d at 654 (“the legislature empowered the county commissions to create and establish

Though we cannot answer your general question about the status of county solid waste authorities in all circumstances, we can answer, in the negative, your specific question regarding the applicability of the State's purchasing rules to county solid waste authorities. The statutory authority of the Purchasing Division of the Department of Administration is found in Chapter 5A, Article 3 of the West Virginia Code. As noted above, "[t]he provisions of th[at] article apply to all of the *spending units* of state government, except as otherwise provided by this article or by law." W. Va. § 5A-3-1(c) (emphasis added). "Spending unit" is defined as "a department, bureau, department, division, office, board commission, authority, agency or institution of the state government *for which an appropriation is requested of the Governor, or to which an appropriation is made by the Legislature*, unless a specific exemption from this chapter is provided in this code." *Id.* § 5A-1-1(21) (emphasis added). A county solid waste authority does not constitute a "spending unit[] of state government," *id.* § 5A-3-1(c), under this statutory definition.

Even assuming that a county solid waste authority meets the first part of the definition for "spending unit"—*i.e.*, it is "a department, bureau, department, division, office, board commission, authority, agency or institution of the state government"—it does not satisfy the latter requirement that it be funded by "an appropriation . . . requested [by] the Governor, or . . . made by the Legislature." *Id.* By statute, each county solid waste authority is funded not by state appropriation but rather "from the general funds in the county treasury to the extent that such expenses are not paid by fees, grants and funds received by the authority from other sources." W. Va. Code § 22C-4-7(b). County commissions have "the authority to determine the amount to be allocated annually to the [county solid waste] authority." *Id.* As the Supreme Court of Appeals has explained, there is a "financial tether" between county commissions and county solid waste authorities. *State ex rel. Warner v. Jefferson Cty. Comm'n*, 198 W. Va. 667, 673, 482 S.E.2d 652, 658 (1996); *see also id.* ("[A]s a matter of law the Jefferson County Commission has a duty and responsibility of financially subsidizing the functions of the [Jefferson County Solid Waste Authority]").

county solid waste authorities"). The second factor—whether the "composition" of the governing board of each county solid waste authority is "prescribed by the legislature," Syl. Pt. 1, *Blower*, 182 W. Va. 528, 389 S.E.2d 739—also appears to favor state agency status. *See* W. Va. Code § 22C-4-3(b) (establishing five-member board with one member appointed by director of the division of environmental protection, two by the county commission, one by the board of supervisors for the soil conservation district in which the county is situated, and one by the chairman of the public service commission). As does the third factor, because the county solid waste authority is "financially dependent on public funds." Syl. Pt. 1, *Blower*, 182 W. Va. 528, 389 S.E.2d 739. But the remaining two factors cut against state agency status under *Blower*. County solid waste authorities do not operate on a "statewide basis," *id.*, but rather on a countywide basis, W. Va. Code § 22C-4-3(a) ("a public agency in every county of the state"). Nor are county solid waste authorities required by statute to deposit funds in the "state treasury." Syl. Pt. 1, *Blower*, 182 W. Va. 528, 389 S.E.2d 739. We also note that the Supreme Court of Appeals appeared to note in *Blower* a difference between State and local funding and control, *see id.* at 530, 389 S.E.2d at 741 ("Factors to consider are . . . whether it is subject to local control . . . and its financial dependence on State coffers"), which would cut against state agency status for county solid waste authorities.

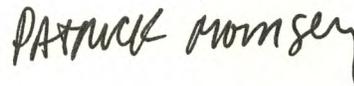
Mark Holstine, Executive Director

April 6, 2016

Page 4

In sum, we cannot answer whether county solid waste authorities are state agencies in all circumstances, but as to your specific question regarding the State's purchasing rules, we believe state law clearly provides that county solid waste authorities are not covered.

Sincerely,

A handwritten signature in black ink that reads "PATRICK MORRISSEY". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Julie Warren
J. Zak Ritchie
Assistant Attorneys General