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Opinion No. 11-19

Hamilton County Commission Withholding PILOT Funds from Hamilton County School Board

QUESTION

Can the Hamilton County Commission legally withhold from the Hamilton County School Board PILOT funds intended for schools?

OPINION

In this instance, the disputed PILOT funds are not required to be paid directly to the Hamilton County School Board when they are received and may be retained by the Hamilton County Commission.

ANALYSIS

This question concerns a dispute between the Hamilton County Commission ("the Commission") and the Hamilton County School Board ("the Board") regarding certain funds received by the County pursuant to a PILOT ("Payment In Lieu Of Taxes") agreement.

A PILOT agreement, in this instance, is an agreement between Hamilton County and a local business whereby, for purposes of encouraging the business to locate in the community and to assist the business with financing, the business is made exempt from ad valorem property taxes. The agreement provides, however, that the business will make payments in lieu of taxes to the County in an amount equal to the taxes that would otherwise be paid to the County and that these funds are intended for education. It appears that in previous years these funds, when received by the County Trustee, have been paid directly to the Board for use as the Board saw fit. Pursuant to a proposed resolution before the County Commission, however, the Commission would retain these funds in a separate capital improvement fund for the School System. The proposed resolution before the Commission states that the funds

> shall be tendered by said Trustee to the County general fund to be segregated and designated exclusively for the capital improvement, maintenance, acquisition of real property, construction, and identified special needs of Hamilton County Schools.

It is our understanding that the current school budget, which was previously proposed by the Board and approved by the Commission, does not include the funds at issue here. Rather, these funds have previously been paid by the County to the Board as additional funds over and above the Board's budget. The proposed resolution quoted above therefore proposes a change in the way the PILOT funds will be handled by the County.

As we have discussed in a number of previous opinion letters,[1] when a School Board proposes a budget to a County Commission, it is the duty of the Commission to consider the budget and either approve or reject it. It is outside the scope of the Commission's powers to make internal changes to the budget, such as line item changes, which fall within the province of the Board. Here, the budget proposed by the Board to the Commission was approved, and we are informed that the budget included none of the funds in dispute here. Therefore, the Commission's withholding of the disputed funds would not be contrary to its budgetary duties.

One argument against the legality of withholding the funds could be based upon Tenn. Code Ann. § 49-3-315 (2009), which deals with the distribution of county funds to school districts. That section states, in pertinent part:

> (a) For each LEA there shall be levied for current operation and maintenance not more than one (1) school tax for all grades included in the LEA. **Each LEA shall place in one (1) separate school fund all school revenues for current school operation purposes received from the state, county and other political subdivisions, if any**. . . . **All school funds for current operation and maintenance purposes collected by any county . . . shall be apportioned by the county trustee** among the LEAs in the county on the basis of the WFTEADA[2] maintained by each, during the current school year. . . .

(emphasis added).

Based upon this provision, it may be argued that the PILOT funds are intended to be school revenues. The PILOT agreement at issue provides that the "in lieu" funds will be paid to the County Trustee, who will disburse the funds to the County general fund for the "educational use and benefit of the County." And the funds are in the same amount as the school taxes that would have been assessed and paid, but for the PILOT agreement. Thus, the argument would be that the funds should be treated as "school funds" under Tenn. Code Ann. § 49-3-315 and paid to the Board.

Nevertheless, the funds at issue are clearly not tax revenues. The funds are defined in the PILOT agreement as payments "in lieu of" taxes. *Black's Law Dictionary* defines "in lieu of" as

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[1] *See e.g.* Op. Tenn. Att'y Gen. 06-118 (July 27, 2006); Op. Tenn. Att'y Gen. 04-098 (June 24, 2004); Op. Tenn. Att'y Gen. 99-100 (May 4, 1999).

[2] "„Weighted full-time equivalent average of daily attendance' or „WFTEADA' means one (1) full-time equivalent average daily attendance multiplied by the cost differential for a program . . . ." See Tenn. Code Ann. § 49-3-302(18) (Supp. 2010).

"instead of," "in place of," or "in substitution of."[3] This indicates that the payments are something other than taxes, regardless of how they are calculated or how they are intended to be used. Nor are the payments "school revenues" that have been received from "the state, county and other political subdivisions . . ." as described in Tenn. Code Ann. § 49-3-315. That section therefore does not compel the payment of the PILOT funds to the Board.

This conclusion is further supported by Tennessee case law. In *Oak Ridge City Schools v. Anderson County*, 677 S.W.2d 468 (Tenn. Ct. App. 1984), a city school system sued the county seeking a declaratory judgment that the county was required to pay the city school system its *pro rata* share of funds received from the Tennessee Valley Authority (TVA) pursuant to a PILOT agreement between TVA and the County. Rejecting an argument premised upon Tenn. Code Ann. § 49-3-315 (1983), the trial court found that because the TVA is a federal entity, the PILOT funds received by the county were not "received from the state, county [or a] political subdivision." *Oak Ridge*, 677 S.W.2d at 469. On appeal, the Tennessee Court of Appeals affirmed this holding, relying upon the reasoning of the Tennessee Supreme Court in *Conger v. Madison County*, 581 S.W.2d 632 (Tenn. 1979). In that case, the Court held that Tenn. Code Ann. § 49-614 (Supp. 1978) (now § 49-3-315) required the apportionment of funds only when the funds were received by the county "from the state, county and other political subdivision . . . ." *Oak Ridge*, at 470-71.[4]

Consequently, regardless of the similarity of the PILOT funds to school taxes, they are clearly not school taxes. Nor does the characterization of the funds in the PILOT agreement as "educational funds" or "school funds" compel their payment directly to the Board. This is particularly true where the same agreement provides that the funds will be paid by the company to the County Trustee, and that the County Trustee will pay the funds to the general funds of the County, and "deposited into an account for the educational use and benefit of the County."

Accordingly, the PILOT funds in dispute here are not required to be paid directly to the Board and may be retained by the Commission.

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[3] *Black's Law Dictionary* 708 (5th ed. 1979).

[4] *See also Crider v. County of Henry*, 295 S.W.3d 269, 274-77 (Tenn. Ct. App. 2009).

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