

In the  
**Supreme Court of Ohio**

DEFIANCE COUNTY, OHIO,

Appellant,

v.

JOSEPH W. TESTA,  
TAX COMMISSIONER OF OHIO,

Appellee.

Case No. 2015-0484

Appeal from the Board of Tax Appeals  
BTA Case No. 2014-2059

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**MERIT BRIEF OF APPELLEE**  
**JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO**

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## I. INTRODUCTION

This case is about whether Defiance County, with the Tax Commissioner's approval, has the authority to transfer \$2 million from a special fund to its general fund.

In 1987, Defiance County established a special fund, the Landfill Fund, to hold fees generated from solid waste disposal in its county landfill. Over the past twenty-five years, Defiance County has used the income generated from the solid waste disposal fees to pay for the expenses of the landfill. The use of the fees to cover costs of the solid waste disposal facility is governed by R.C. 343.08(A)(2). Legislation enacted in 1988 established statewide policies for the management of solid and hazardous waste. Am.Sub.H.B. No 592, 142 Ohio Laws, Part III 4418. The legislation allows for a publically held sanitary landfill such as the one in Defiance County. As of the transfer request, the income generated from the landfill has exceeded the expenses.

Defiance County requests that money generated from its residents' disposal of solid wastes be transferred to Defiance County's general fund, so the County can use those funds for other purposes. Defiance County set up the Landfill Fund intending that all of the expenditures to operate and maintain the Landfill would be from this special fund, and in practice, Defiance County has only ever used the Landfill Fund to operate and maintain the landfill. Defiance County cannot now decide that it wants to repurpose the designated funds for some other unrelated expense. The fees were paid into the Landfill Fund for a specified purpose, and these fees can only be used in support of that specified purpose, i.e., the Landfill.

The Tax Commissioner denied Defiance County's request to transfer the Landfill Funds to the general fund. The Tax Commissioner found that fees generated from the local disposal of solid waste should be treated the same as fees generated from the disposal of solid waste to a

solid-waste-district, and that therefore, the money in the Landfill Fund could only be used for the purposes for which the Landfill Fund was established. The Board affirmed, concluding that the Tax Commissioner properly exercised his discretion in reaching his conclusion.

In its review, the Board correctly applied the abuse of discretion standard, and also correctly concluded that the Tax Commissioner acted within his discretion. The record in this matter fully supports the Board's conclusion. But even if the Board were to have applied the more customary standard of reviewing the reasonable and lawfulness of the Tax Commissioner determination, the record amply supports the conclusions reached by the Tax Commissioner.

The Tax Commissioner requests that this Court affirm the decision of the Board.

## **II. STATEMENT OF FACTS AND THE CASE**

The Defiance County (the "County") owns and operates the Defiance County Landfill (the "Landfill"). Hearing Transcript at 47; Tax Commissioner Hearing Exhibit 1.

The Landfill began accepting solid waste in 1969. Hearing Transcript ("HT") at 33; County Hearing Exhibit E. At that time, the County imposed a disposal fee, called a "tipping fee." County Hearing Exhibit E. The County deposited the tipping fees into the Defiance County General Fund. HT at 56-57; County Hearing Exhibit E. In 1987, the County passed a resolution which established a new and separate fund called the Defiance County Landfill Fund #073. HT at 36; County Hearing Exhibit E. The County established the Landfill Fund for "the purpose of creating a better bookkeeping system." County Hearing Exhibit E at ¶ 7. Thereafter, the County deposited all tipping fees into the Landfill Fund. County Exhibit E.

In 1988, the General Assembly established statewide policies and programs for the management of solid and hazardous waste. Am.Sub. H.B. 592, 142 Ohio Laws, Part III, 4418, codified in R.C. Chapters 343 and 3734. This legislation required every county in Ohio to either

form a single-county solid-waste-management district, or to participate in a joint solid-waste-management district. R.C. 3734.52(A). The County participates in a joint solid-waste-management district: the Four County Solid Waste District (Solid Waste District). HT at 33; County Hearing Exhibit G, J. The Solid Waste District imposes a fee for the disposal of solid waste. County Hearing Exhibit G, N; R.C. 343.08(A), (B).

Subsequent to the creation of the Solid Waste District, the County has required the payment of a “tipping fee” and a “solid waste disposal fee” for people wishing to dispose of solid waste at the Landfill. HT at 47, 49; County Hearing Exhibit N at ¶ 8. A customer pays a single “disposal fee” to the County, which includes both the County’s tipping fee and the Solid Waste District’s solid waste disposal fee. HT at 63, 65. Once the payment is received by the Landfill, it is forwarded to the Defiance County Treasurer for deposit into the Landfill Fund at Huntington National Bank. HT at 48, 63, 65; County Hearing Exhibit N at ¶ 15, Q. Monthly, the County pays out of the Landfill Fund the amount that represents the Solid Waste District’s solid waste disposal fees and sends that payment to the First Federal Bank.<sup>1</sup> HT at 48-50; County Hearing Exhibit M, N at ¶ 13. The amounts representing the local tipping fees are retained within the Landfill Fund. HT at 48, 49, 63, 65; County Hearing Exhibit N at ¶ 15.

The County spends just over \$3 million dollars a year on Landfill operations. HT at 38; Tax Commissioner’s Hearing Exhibit 1. The County has always operated the Landfill so that the funds generated by the facility are spent on, and operate, the current and future facility needs and costs. HT at 38; Tax Commissioner’s Hearing Exhibit 1. In practice, the County has only ever used funds in the Landfill Fund for landfill purposes. HT at 48-49, 58; County Hearing Exhibit E at ¶ 8; Tax Commissioner’s Hearing Exhibit 1.

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<sup>1</sup> The County also sends solid waste disposal payments to the Ohio EPA and to the township from which the disposal originated. County Hearing Exhibit N, ¶ 9, 12. R.C. 343.08.

The County operated the Landfill Fund as a break-even operation because it is a proprietary account, but through the years, the income into the Landfill Fund has exceeded the operational expenses. HT at 38; Tax Commissioner's Hearing Exhibit 1; ST at 12-20; HT at 23, 72. A surplus of funds now resides in the Landfill Fund. ST at 12-20; HT at 23, 72.

On March 3, 2014, the County filed a petition with the Tax Commissioner pursuant to R.C. 5705.15 and R.C. 5705.16 for authority to transfer funds from the County's Landfill Fund (Fund #073) to the Capital Improvements Fund (#072). The County requested to transfer \$2,300,000.00. Statutory Transcript at 1; 12-20. In the petition, the County stated that the Landfill Fund had "excess" funding which the County wished to use for emergency repairs, and for American with Disabilities Act upgrades, to the courthouse. ST at 12. Insufficient funds presently existed in the Capital Improvement Funds to make the desired repairs and renovations to the courthouse. ST at 12.

The County stated in the petition that the funds sought to be transferred were not encumbered, because they were not the "proceeds or balances of tax levies, loans, bond issues, special levies for the payment of loans or bond issues, the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose, and/or the proceeds or balances of any license fees imposed by law for a specified purpose." ST at 12.

The Tax Commissioner denied the petition. ST at 1-3. The Tax Commissioner concluded that the public funds in the Landfill Fund were restricted in use for the benefit of the Landfill. ST at 3. The Board of Tax Appeal (the "Board") affirmed, concluding that the Tax Commissioner's determination was a "logical and well-reasoned" attempt to "bring uniformity under the laws and in practice" with respect to this area of the law. Decision at 3.

The Board applied the standard of review that applies to fund transfer requests, an abuse of discretion, and concluded that the Tax Commissioner's determination was not "unreasonable, arbitrary, or unconscionable." Decision at 3.

The County now seeks review before this Court. Notice of Appeal to the Supreme Court (filed March 25, 2015).

### **III. LAW AND ARGUMENT**

The standard of review is of a Board decision by a reviewing court is well-settled: this Court affirms reasonable and lawful Board decisions. R.C. 5717.04; *Stds. Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, ¶ 10. *See also Strongsville Bd. of Edn. v. Cuyahoga Cty Bd. of Revision*, 77 Ohio St.3d 402, 405 (1997).

As applied here, the Board found that the Tax Commissioner acted within his discretion when he denied the County's petition. The Board found no perversity of will, bias, or passion in the Tax Commissioner's determination: because the money in the Landfill Fund had the same character and nature as solid waste disposal fees, which are restricted to the use and benefit of the District, the money in the Landfill Fund is similarly restricted to the use and benefit of the Landfill. The Board's decision was reasonable and lawful. It applied the review standard applicable to fund transfer petitions and engaged in the correct review process.

Moreover, even if the Board applied a less deferential reasonable and lawful review standard, the Board made no error. The record fully supports the Tax Commissioner's determination as reasonable and lawful.

The Board properly reviewed this appeal and committed no error. This Court should affirm the decision of the Board.

**Tax Commissioner's Proposition of Law No. 1:**

**A request to transfer public funds pursuant to R.C. 5705.15 and 5705.16 invokes the Tax Commissioner's discretionary authority. Appellate review of the Tax Commissioner's final determination in which a fund transfer request is denied is on an abuse of discretion standard.**

The Board properly concluded that the Tax Commissioner's denial of a petition to transfer funds R.C. 5705.15 and R.C. 5705.16 is reviewed on an abuse of discretion standard. The Tax Commissioner's decision to approve or deny a petition is made within the Tax Commissioner's role as the state's tax expert and administrator, and as a protector of public funds. Accordingly, the decision with respect to the petition is a matter within the Tax Commissioner's discretion.

**A. Public funds transfers occur pursuant to statutory authorization.**

The ability of a political subdivision to transfer public monies from one fund to another is controlled by statute. The general rule is, "No transfer shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise," except under certain circumstances that are specified by statute, i.e., R.C. 5705.14. These circumstances allow for fund transfer, for example, when a balance remains in a bond fund that is no longer needed for the original purpose for which the fund was created, or when the political subdivision chooses to move money from the general fund to any other fund. R.C. 5705.14(A), (E).

If the transfer provisions of R.C. 5705.14 do not apply, a political subdivision must follow the provisions of R.C. 5705.15 and R.C. 5705.16 to effect a fund transfer. In this regard, the two statute are read together. R.C. 5705.15 details *which* funds are subject to transfer:

In addition to the transfers authorized in [R.C. 5705.14], the taxing authority of any political subdivision may, *in the manner provided in this section and [R.C. 5705.16]*, transfer from one fund to another any public funds under its supervision, except the proceeds or balances of loans, bond issues, special levies for the payment of loans or bond issues, the proceeds or balances of funds derived

from any excise tax levied by law for a specified purpose, and the proceeds or balances of any license fees imposed by law for a specified purpose. (Emphasis added.)

R.C. 5705.16 details the *process* by which a fund transfer occurs. A central element of this process is the Tax Commissioner's participation. The first step in the fund transfer process is that taxing authority passes a resolution by a majority of its members declaring the necessity for the transfer of the funds. *Id.* Next, a petition is filed in the court of common pleas in the county where the political subdivision is located, and a copy of the petition is forwarded to the Tax Commissioner for his "examination and approval." *Id.* If the Tax Commissioner approves the petition, the clerk of the court of common pleas files the petition and the court of common pleas holds a hearing on the petition. *Id.* After the hearing, if the court approves the petition, the political subdivision may transfer the funds. *Id.*

If the petition is denied by the Tax Commissioner, however, he returns it to the political subdivision and includes a memorandum detailing the Tax Commissioner's objections. *Id.* The political subdivision has the option to appeal the Tax Commissioner's decision to this Board. R.C. 5717.02.

**B. The approval requirement in a fund transfer pursuant to R.C. 5705.15 and R.C. 5705.16 is an exercise of discretionary authority.**

The requirement that a political subdivision must have outside authorization to transfer public funds has been a part of Ohio's statutes for over 50 years. "The substantive provisions of R.C. 5705.16 are essentially the same as those of former Sections 5625.13b to 5625.13f, inclusive, of the General Code[.]" *Lake Township of Stark County v. Kinney* (March 27, 1984),

Case No. 82-F-525, *aff'd*, *Cassetty v. Kinney* (Sept. 24, 1984), Stark Cty. App. Ct. No. CA-6378.<sup>2</sup>

This Court has described the capacity in which the decision to grant or deny transfer authorization is made:

[I]t is to be noted that the tax commission is called upon by section 5625-13c, General Code, to approve or disapprove the petition submitted to it. If it disapproves, it is to return the petition with a memorandum of its objections. If it approves, it is required to forward the petition, marked with its approval, to the clerk of the common pleas court to which the petition is addressed. Such a performance is certainly much more ministerial than judicial. Counsel say it is not clear what the purpose of the Legislature was in requiring the submission of the petition to the tax commission; **but the purpose evidently was to give the common pleas court the benefit of the opinion of the tax commission. While the tax commission is required to exercise its judgment as to whether or not the petition should be approved, the result of what it does is more in the nature of an expert opinion than a judicial pronouncement. It is to approve or disapprove from a practical point of view, from the point of view of its own particular function.** That the commission was not meant to act in a judicial capacity is apparent from the fact that the petition when approved must be submitted to the common pleas court. And the next two sections provide for the giving of notice and the hearing of the petition and objections. Evidently the judicial function with reference to such petition is exercised by the court of common pleas. (Emphasis added.)

*State ex rel. Caley v. Tax Commission of Ohio*, 129 Ohio St. 83, 87-88 (1934).

In other words, when the Tax Commissioner approves or denies a fund transfer request pursuant to the statutes presently enacted as R.C. 5705.15 and R.C. 5705.16, he exercises his judgment within his role as the state's tax expert and administrator and acts within his discretion. *Caley*, 129 Ohio St. at 87-88. And when the Tax Commissioner examines and approves the petition, or returns the petition with a statement of his objections if the decision is to deny the petition, the Tax Commissioner has acted within his function and according to his discretion.

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<sup>2</sup> Originally, the "tax commission" provided the transfer authorization, but this later changed to the Board of Tax Appeals, then to the Commissioner of Tax Equalization, and now to the Tax Commissioner. *Lake Township, supra*.

R.C. 5705.16. See also *Lake Township, supra* at 5 (“it is clear from the terms of [R.C. 5705.16] that the Commissioner is authorized to either approve or disapprove such petition, in his sole discretion”).

This authority and discretion the General Assembly has given to the Tax Commissioner for reviewing R.C. 5705.15 and R.C. 5705.16 petition is fitting. The Tax Commissioner is the state’s tax expert. He provides his expert opinion on the appropriateness of petitions requesting transfers of public funds. *Caley*, 129 Ohio St.at 87-88. If the petition advances to the common pleas court, the court uses the Tax Commissioner’s opinion in its own decision-making process. R.C. 5705.16; *Caley*, 129 Ohio St.at 87-88.

The Tax Commissioner is also responsible for administering the state and local taxes used to provide Ohio’s public services. And in this role, the Tax Commissioner protects the public’s general welfare: through the direction of R.C. 5705.16, the Tax Commissioner ensures that the public funds, which are held in trust for the benefit of the public, are expended only by clear authority of law and in compliance with applicable statutory provisions. *Servomation Corp. v. Kosydar*, 46 Ohio St.2d 67, 71; *State ex rel. Smith v. Maharry*, 97 Ohio St. 272 (1918), paragraph one of the syllabus. See also 2007 Ohio Atty.Gen.Ops. No. 2007-043 (“moneys held by a township are public funds and are governed by the principle that public funds are held in trust for the benefit of the public. Public funds may be expended only by clear authority of law and in accordance with applicable statutes.”)

This obligation to protect the public’s general welfare by ensuring the proper use of public funds further requires that if there is any doubt about a political subdivision’s authority to spend certain public funds, that doubt must be resolved against the grant of authority to make the expenditure. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44 (1917), paragraph

three of the syllabus; *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99 (1916). Thus, when the Tax Commissioner considers a fund transfer petition, he ensures that the public funds are spent only for the purposes authorized by statute, in the manner provided by statute, and for the benefit of the public.

The Tax Commissioner's discretionary role to authorize fund transfer petitions is similar to his role with respect to the abatement of penalties on tax assessments. In that context, again, because the Tax Commissioner is the state's tax expert and administrator responsible for administering and enforcing the state's public funds, he has broad discretion to remit tax penalties. See R.C. 5739.13; *J.M. Smucker, LLC v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶ 15; *Jennings & Churella Const. Co. v. Lindley*, 10 Ohio St.3d 67, 70; *Servomation Corp.*, 46 Ohio St.2d at 71.

The absence of statutory criteria in R.C. 5705.16 for the Tax Commissioner to evaluate a fund transfer petition is a further reflection of the General Assembly's understanding that each petition must be evaluated on its own facts, based on the circumstances presented in each case. This individualized evaluation of petitions is similar to the manner in which property value determinations are considered: on the evidence only for the year at issue, without consideration of any other tax year. *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, ¶ 20. Thus, because each funds transfer petition presents its own unique circumstances, the petition must be considered on its own merits and without regard to the outcome of other, previously determined, funds transfers. The language of R.C. 5705.16 connotes a clear legislative intent to grant the Tax Commissioner broad grounds upon which to decide a petition. *Lake Township, supra*.

Based on the foregoing, the decision to approve or deny a petition pursuant to R.C. 5705.15 and R.C. 5705.16 is a discretionary power of the Tax Commissioner. *Caley*, 129 Ohio St. at 87-88. Such a decision is within the Tax Commissioner's obligation to ensure that public funds are used for the public's benefit and expended in accordance with the applicable statute. *Servomation Corp.*, 46 Ohio St.2d at 71; *Maharry*, 97 Ohio St. at, paragraph one of the syllabus.

**C. Appellate review of a discretionary decision is on an abuse of discretion standard.**

Appellate review of a discretionary power is limited to whether an abuse of discretion has occurred. *Jennings & Churella Const. Co.*, 10 Ohio St.3d at 70; *Interstate Motor Freight System v. Bowers*, 170 Ohio St. 483. See also *Frankelite Co. v. Lindley*, 28 Ohio St.3d 29 (1986). Accordingly, when the Tax Commissioner exercises his discretion to deny a fund transfer petition pursuant to R.C. 5705.15 and R.C. 5705.16, that determination is reviewed on an abuse of discretion standard. *Lake Township, supra*. See also *Deercreek Twp. Bd. of Trustees, Pickaway Cty., Ohio v. Testa* (Sept. 19, 2014), BTA Case No. 2012-1357; *Buck Twp.: Hardin County Fiscal Officer v. Testa* (Oct. 2, 2013), BTA Case No. 2010-2016; *Lincoln Twp. Bd. of Trustees v. Levin* (Oct. 18, 2011), BTA Case No. 2009-M-693.

**D. The abuse of discretion standard.**

An abuse of discretion means that a decision is "unreasonable, arbitrary, or unconscionable." *J.M. Smucker, LLC*, 113 Ohio St.3d 337, 2007-Ohio-2073, at ¶ 16. Under this standard, an appellant must show that there is "more than an error of law or judgment." *Id.* The appellant must show that the decision-maker's attitude was unreasonable, arbitrary, or unconscionable. *Id.*

An abuse of discretion has been described as involving "far more than a difference in \*\*\* opinion \*\*\*". The term discretion itself involves the idea of choice, of an exercise of the will, of

a determination made between competing considerations. In order to have an ‘abuse’ in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St. 3d 83, 87 (1985), quoting *State v. Jenkins*, 15 Ohio St.3d 164, 222.

The abuse of discretion standard is a high hurdle for an appellant to overcome. The law presumes that public officers act within the limits of their authority conferred by law, and that those actions are in good faith and in the exercise of sound judgment. *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 84-85 (1944). The maxim ‘omni praesumuntur rite esse acta’ reflects this principle: public officers are presumed to have properly discharged the duties of their office and to have performed faithfully those matters with which they are charged. *Wheeling Steel Corp.*, 143 Ohio St. at 84-85. And because of this strong presumption, appellants must show more than just an improperly performed duty. *See, e.g., Hass Trenching Co. v. Tracy* (March 3, 1995), BTA Case No. 95-B-83.

The exercise of honest judgment does not constitute an abuse of discretion. *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St.3d 581, 590; *Lake Township, supra*. In this regard, even if a reviewing court may have reached different conclusions that the original decision-maker, that, without more does not establish an abuse of discretion. *Cox v. Fishers Fazio Foods, Inc.*, 13 Ohio App.3d 336, 337 (1984). No matter how erroneous the original decision-maker’s decision may seem, provided that the decision is based on honest judgment, the reviewing court may not substitute its judgment for that of the original decision-maker. *See, e.g., Stimmel v. Levin* (Aug. 3, 2010), BTA Case No. 2008-V-824.

In this case, the Board properly determined that the Tax Commissioner's denial of the County's petition was a matter within his discretion, to be reviewed on an abuse of discretion basis. Accordingly, the Board applied the correct standard of review and committed no error.

**Tax Commissioner's Proposition of Law No. 2:**

**The Tax Commissioner acts within his discretion to deny a petition to transfer funds from a special fund to a general fund when the public money in that special fund was intended for a specific purpose, and was in fact, used only for that specific purpose.**

The Board determined that the Tax Commissioner's discretionary decision to deny the County's fund transfer petition was logical and well-reasoned, and therefore, it affirmed the Tax Commissioner's determination.

**A. The Tax Commissioner appropriately exercised his discretion.**

The Tax Commissioner denied the County's petition to transfer \$2.3 million from a special fund, the Landfill Fund, to a general fund, the Capital Improvements Fund. These public funds sought to be transferred were derived from the accumulated local tipping fees paid by customers who disposed trash at the Landfill.

In denying the petition, the Tax Commissioner made two observations. *First*, the Tax Commissioner reviewed the statutory provisions pertaining to solid waste districts and the expenditure of the related public funds. These statutory provisions require that if a landfill is within a joint solid waste district, the associated disposal fees must be deposited into a separate and distinct fund that is used exclusively for the cost of the management, maintenance, and operation of the solid waste collection or other solid waste facilities of the district. R.C. 343.08(A). Any surplus monies can only be used for the enlargement, modification, or replacement of the solid waste facilities, and applied to expenses that are only "for the use and benefit of the district." *Id.* This same legislation also contemplates that the landfill in the solid

waste district could be owned by the local board of county commissioners, and in that case, the same restrictions apply on the collection and use of the disposal fees. *Id.*

*Second*, the Tax Commissioner observed that a county board of commissioners is limited with respect to its use of public funds. *See generally*, R.C. 5705.10. For instance, “all revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose” and “[m]oney paid into any fund shall be used only for the purposes for which such fund is established.” R.C. 5705.10(D), and (I).

With these principles in mind, the Tax Commissioner concluded that because the tipping fees were revenue from “a source other than the general property tax” and paid into a special fund for a specified use, just like the Solid Waste District disposal fees, “the funds garnered by a county that owns a landfill must, similarly, be limited to the purposes identified in [R.C. 343.08(A)(2)].” The Tax Commissioner found that “[d]iffering use of funds based upon the ownership of a landfill by a solid waste management district as opposed to the county itself is both illogical and inconsistent.” ST at 3. Accordingly, the Tax Commissioner concluded that the public funds in the Landfill Fund were available only for the use and benefit of the Landfill. ST at 3.

**B. The Board correctly concluded that the Tax Commissioner’s determination was logical and well-reasoned and not an abuse of discretion.**

In its review of this matter, the Board declined to find that the Tax Commissioner abused his discretion when he denied the petition. Decision at 3. The Board specifically concluded that the Tax Commissioner’s attempt to “bring uniformity under the laws and in practice” with respect to this area of the law was “logical and well-reasoned.” Decision at 3. The Board further held that the Tax Commissioner’s determination was not “unreasonable, arbitrary, or

unconscionable.” Decision at 3. The Board’s consideration of the record in this matter properly determined that the Tax Commissioner’s decision to deny the County’s petition was a matter within his honest judgment and discretion, and was not “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Huffman*, 19 Ohio St. 3d at 87.

*1. The Tax Commissioner properly denied the County’s request to transfer funds.*

The Tax Commissioner properly performed within his official role and duty to examine the County’s petition. In conducting this examination, the Tax Commissioner sought, and received, additional information from the County. ST at 1, 4-11. Thereafter, the Tax Commissioner issued his final determination, and because he denied the petition, he included his reasons for his objection to the transfer. In accordance with his statutory obligations as set forth in R.C. 5705.16, the Tax Commissioner has exercised his honest judgment, discharged the duties of his office, and faithfully performed those duties. The Tax Commissioner is entitled to the presumption that he exercised his actions in good faith and with sound judgment. *Wheeling Steel Corp.*, 143 Ohio St. at 84-85.

The Board properly observed that the Tax Commissioner’s determination evidenced a logical and reasoned attempt to advance and synthesize solid waste disposal at the local level with the state’s policies for regional solid waste disposal. Decision at 3. The Board’s decision also acknowledged that the Tax Commissioner understood his obligations with respect to public funds, and the predisposition within the law for preserving public assets. *A. Bentley & Sons Co.*, 96 Ohio St. at paragraph three of the syllabus; *Locher*, 95 Ohio St. at 99.

Thus, the Board reasonably concluded that the Tax Commissioner was well within his discretionary authority when he concluded that public funds derived from local solid waste disposal, i.e., tipping fees, should remain earmarked for local solid waste disposal purposes, just as solid waste disposal fees are earmarked for solid waste district purposes. The Tax Commissioner was ensuring that the rules and regulations pertaining to the public funds generated from disposing solid waste to a local landfill were consistent with the rules and regulations pertaining to public funds generated from disposing solid waste to a solid waste district.

The Tax Commissioner's conclusion that local solid waste disposal was to be treated consistently with solid waste disposal for a specified region, i.e., the Solid Waste District, is consistent with the applicable legislation. For instance, a landfill is a solid waste facility residing within a solid waste district, and is an integral component of any solid waste disposal plan. R.C. 3734.01(N) (a solid waste "facility" include a landfill).

In fact, the state's policy with respect for the management of solid and hazardous waste requires the environmental protection director to prepare a plan which, among other things, reduces the state's reliance on the use of landfills for the management of solid wastes. R.C. 3734.50(A). And an aspect of the rationale for enacting the legislation that called for the creation of solid waste districts was to allow local counties the ability and authority to forecast solid waste disposal supply and demand for their constituent counties, and to provide adequate new landfill capacity to meet projected solid waste disposal needs. Am.Sub. H.B. 592, 142 Ohio Laws, Part III, 4418; R.C. 343.01; R.C. 3734.52, R.C. 3734.53. The solid waste district legislation plainly contemplates that a landfill will be included within the area to accommodate the solid waste disposal needs of a community. R.C. 343.01(C), (G)(2); R.C. 3734.53(C).

Moreover, the statutory constraint that funds derived from solid waste disposal may only be used for solid waste purposes is not new. Even prior to the enactment of the legislation that required counties in Ohio to form a single-county solid waste district or participate in a joint solid-waste management district, for the purpose of “orderly management of the solid waste management planning,” funds derived from solid waste disposal could only be used for the “use and benefit” of solid waste disposal facilities. *See, e.g.*, R.C. 343.08 (version in effect in 1978). The dedication of funds generated by disposing of solid waste is not a new state policy.

Finally, it is unclear whether Defiance County is even statutorily authorized to retain the tipping fees that it charges for solid waste disposal *at all*. According to R.C. 343.08, a board of county commissioners is permitted to assign disposal rates, but:

All moneys collected by or on behalf of a county or joint district as rates or charges for solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery service in any district shall be paid to the county treasurer in a county district or to the county treasurer or other official designated by the board of directors in a joint district and kept in a separate and distinct fund to the credit of the district.

In other words, all the money paid for the disposal of solid waste is to be held in a *distinct fund to the credit of the district*, suggesting that Defiance County has no authority to segregate local tipping fees from Solid Waste District disposal fees. And if this is the case, then the Tax Commissioner most appropriately denied the County’s requested transfer because all the funds derived from solid waste disposal could only be applied “for the use and benefit of the district.” R.C. 343.08(A).

The Tax Commissioner’s decision was clearly within the purview of the power and duty imposed on him by R.C. 5705.16. Accordingly, the Tax Commissioner lawfully exercised his discretion in denying the County’s petition.

2. *The evidence adduced at the Board hearing supports the Tax Commissioner's denial of the petition.*

The Tax Commissioner's determination was consistent with the manner in which the County has managed its Landfill Fund for over the past 25 years.

At the Board hearing, the testimony established that the County considered the local tipping fees to have the same restrictions and limitations as the Solid Waste District disposal fees and intended the monies in the Landfill Fund to be used solely for landfill purposes. The County acknowledged as much: the County's operation and management of the Landfill Fund is a proprietary fund account and the Landfill must operate on a break-even basis. HT at 38; Tax Commissioner's Hearing Exhibit 1. The County purposefully created this specially-designated, special fund: it deliberately chose to segregate the tipping fees from other County funds and keep the tipping fees identifiable, if only for bookkeeping purposes. HT at 29, 30. And into this proprietary and special fund, the County has only ever deposited tipping and disposal fees. HT at 48, 63, 65; County Hearing Exhibit N at ¶ 15. The disposal fees represent customer payments, and include both the County's tipping fee and the Solid Waste District's solid waste disposal fee. HT at 48, 63, 65; County Hearing Exhibit N at ¶ 15. Thus, the only money ever deposited into the Landfill Fund was money derived from the operation of the Landfill and solid waste disposal.

Further, the County's distributions from the Landfill Fund have only been for one of two purposes. First, the County paid the facility's expenses as necessary to operate the Landfill. HT at 38, 48-49, 58; County Hearing Exhibit E at ¶ 8; Tax Commissioner's Hearing Exhibit 1. Second, the County paid the Solid Waste District's monthly solid waste disposal fees from the Landfill Fund. HT at 48 - 50; County Hearing Exhibit M, N at ¶ 13. The County paid these fees to the Solid Waste District's bank: First Federal Bank. *Id.* And this is yet another example that the County viewed the local tipping fees as possessing the same restrictions as Solid Waste

District disposal fees: as a regular practice and procedure the County commingles the local tipping fees and the Solid Waste District's disposal fees in the Landfill Fund at the Huntington Bank. HT at 66.

In fact, the evidence established that County had always considered the money in the Landfill Fund to have the same limitations as the Solid Waste District disposal fees and to be used only for Landfill purposes. Other examples of the County's clear intention to apply Landfill Funds only for the use and benefit of the Landfill include: the County's creation for a special fund designed to accept only solid waste disposal fees, the County's commingling of the local tipping fees with the statutorily restricted Solid Waste District disposal fees, and the County's actual practice to only use the funds in the Landfill Fund for solid waste purposes.

Indeed, the County's decision to now, after operating the Landfill Fund as a special fund designated for use only in connection with the Landfill for over 25 years, to claim that the money failed to acquire any such limitation is disingenuous. The County's present logic defeats its whole purpose of having established the special fund to segregate and identify the local tipping fees in the first place. Clearly, the County has now identified what appear to be available funds for some other purpose and it is attempting to avoid the inevitable conclusion: the tipping fees were paid into a special fund for a specified use. These tipping fees may only be applied for the use and benefit of the Landfill.

*3. The Board's decision is consistent with other fund transfer cases.*

The Board's decision in this case is consistent with precedent from other fund transfer cases. The Board has consistently held that the Tax Commissioner may exercise his judgment and discretion in denying a fund transfer petition.

In *Deercreek Township*, the Board upheld a final determination in which the Tax Commissioner disapproved a request to transfer to its general fund \$60,000 from the road and bridge fund. *Deercreek Twp., supra*. In *Buck Township*, the Board upheld Tax Commissioner's disapproval of a request to transfer to the general fund \$50,000 from its road maintenance fund. *Buck Twp.: Hardin County Fiscal Officer, supra*. The Board similarly affirmed the Commissioner's rejection of Lincoln Township's request to transfer \$40,000 from its road and bridge fund to its general fund. *Lincoln Twp., supra*. And in *Lake Township*, the Board found no abuse of discretion when the Tax Commissioner disapproved a petition to transfer \$3,700 from the Township's general fund to the police district of another subdivision. *Lake Township, supra*.

There is, however, a notable distinction between each of the above cases and this case: the amount of fund transfer request. The County seeks to transfer \$2.3 million and the Tax Commissioner's determination clearly reflects his doubt as to the County's authority to spend the Landfill Funds in the manner so desired. *A. Bentley & Sons Co.*, 96 Ohio St. at paragraph three of the syllabus; *Locher*, 95 Ohio St. at 99. Consequently, the Tax Commissioner acted in the name of public welfare with respect to the public funds and resolved the issue in favor of preserving the public assets within the Landfill Fund. The Board's decision acknowledged this Tax Commissioner decision and the obligation to ensure that public funds are disbursed only within the clear authority of the law.

4. *The Board properly deferred to the Tax Commissioner's judgment and discretion and declined to substitute its judgment.*

Finally, even if the Board disagreed with the Tax Commissioner's reasoning and rationale in this matter and would have itself reached a contrary conclusion, the Board is not entitled to substitute its judgment for that of the Tax Commissioner. *Shafer*, 159 Ohio St.3d at

590; *Cox*, 13 Ohio App.3d at 337. The Tax Commissioner exercised his honest judgment, and even if his determination was erroneous, there is no abuse of discretion. *Id.* The record demonstrates that Tax Commissioner has acted reasonably, discharged the duties of his office, and faithfully performed the obligations with which he has been charged. He has provided both factual support and logic for his determination, and has done so without any passion or bias. The fact that the Board may have reached a different result does not demonstrate any abuse of discretion. *Id.*; *Stimmel, supra*; *Lake Twp., supra* at 8.

Based on the foregoing, the Board properly concluded that the Tax Commissioner had not abused his discretion.

**C. The Tax Commissioner's determination was reasonable and lawful.**

Alternately, the Board's decision to affirm the Tax Commissioner's determination was correct because the Tax Commissioner reasonably and lawfully denied the County's public fund transfer request.

When the abuse of discretion review standard does not apply, the Board upholds Tax Commissioner findings on the principle that the Tax Commissioner's findings "are presumptively valid, absent a demonstration [by the party challenging the findings] that those findings are clearly unreasonable or unlawful." *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, at ¶ 7, quoting *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, ¶ 10; *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). See also *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶ 16; *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 69 (1986), paragraph one of the syllabus.

The rationale for this presumption is because the Tax Commissioner has substantial expertise, experience, and discretionary authority as the state official responsible for

administering and enforcing most state and many local government taxes, and those findings must be upheld unless the one challenging those findings demonstrates them to be "clearly unreasonable or unlawful." *Shiloh Automotive, Inc.* at ¶ 16; *A. Schulman, Inc.* at ¶ 7; *Hatchadorian* at paragraph one of the syllabus. *See also, Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation*, 63 Ohio St.3d 648, 656 (1992); *Bd. of Ed. of SouthWestern City Schools v. Kinney*, 24 Ohio St.3d 184, 186 (1986); *Stanton, Pros. Atty., v. Tax Commission*, 114 Ohio St. 658, 667-668 (1926).

In this case, the Board specifically concluded that the Tax Commissioner's final determination was "logical and well-reasoned." Decision at 3. The Board recognized that the Tax Commissioner analogized the public funds generated from disposals to the Landfill to the public funds generated from disposals to the Solid Waste District. The Board further recognized that because the funds in the Landfill Fund derive from the same action – the disposal of solid waste – the same restrictions and limitations imposed on the Solid Waste District disposal fees should apply to the County's tipping fees.

The evidence at presented at the hearing further supported the Tax Commissioner's final determination, as explained above. This evidence showed that the County's practices and procedures over 25 years in operating the Landfill Fund are consistent with the conclusions contained in the Tax Commissioner's final determination: the tipping fees were paid into the special Landfill Fund for use only in the operation of the Landfill, and these funds have in fact only ever been applied by the County for the use and benefit of the Landfill.

Defiance County's reliance on the case of *City of Niles v. Union Ice Corp.*, is misplaced. 133 Ohio St. 169 (1938). In the *City of Niles*, the Tax Commission (now the Tax Commissioner) authorized a transfer of funds that were "under [the City's] supervision." *Id.* at 171. The City

sought to pay off its debt with the Mahoning Valley Sanitary District Fund with a transfer of excess funds generated through the City's sale of electricity to its resident consumers. *Id.* at 170. On appeal, the dispute centered on whether the funds were held in public trust for the benefit of its consumers, and whether members of the general public – intervening resident consumers and taxpayers – had a sufficient interest in those public funds to contest the approved transfer authorization. *Id.* at 180-181. In affirming the fund transfer, this Court rejected the legal theories advanced by the consumers and taxpayers, including among others, that the funds sought to be transferred were held as a public trust. *Id.*

Defiance County relies on the *Niles* case to contend that just as the transfer request was approved there, its transfer request should similarly have been approved. In this regard, the County is correct: the funds in this matter, just as in *Niles*, are funds that are “under its supervision.” R.C. 5705.15.

But the County's argument is incorrect. *First*, just because the political subdivision has funds “under its supervision” that may be available for transfer pursuant to R.C. 5705.15, does not mean that the Tax Commissioner is nevertheless obligated to approve the transfer request; the approval provisions of R.C. 5705.16 remain implicated. R.C. 5705.15 (“In addition to the transfers authorized in [R.C. 5705.14], the taxing authority of any political subdivision may, in the manner provided in this section and [R.C. 5705.16], transfer from one fund to another any public funds under its supervision”). And because each fund transfer is unique to the circumstances presented in the petition, the Tax Commissioner must base his decision on the merits of the petition presented, and not the outcome of previously granted fund transfers. *See, e.g., Buck Twp.: Hardin County Fiscal Officer, supra.* Thus, the fact that a transfer was

approved in one circumstance does not control the Tax Commissioner's decision in a subsequent transfer request. *See, e.g., Deercreek Twp. Bd. of Trustees, supra.*

*Second*, in *Niles*, the interveners argued that the City held the public funds in trust for their benefit. *City of Niles* at 179. This Court rejected that argument, concluding that no such limitation or restriction was presented in that matter. *Id.* at 180. But in this case, such a limitation does exist. State policy, as expressed through statutory law, requires that funds generated from solid waste disposal are to be applied "for the use and benefit" of solid waste disposal needs and requirements. R.C. 343.08(A). The funds Defiance County seeks to transfer are generated from the disposal of solid waste, and because funds of this nature are to be applied in such a specified and identifiable manner, these funds must similarly be restricted to such a use and the requested transfer rejected.

As a consequence, the Board properly affirmed the Tax Commissioner's reasonable and lawful final determination denying the County's petition to transfer money from the special Landfill Fund to a general fund account held by the County.

#### **IV. CONCLUSION**

Based on the foregoing, the Tax Commissioner respectfully requests this Court to affirm the Board's decision.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been sent by regular mail and email this  
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