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STATE OF ILLINOIS

October 27, 1992

FILE NO. 92-021

STATE MATTERS:
Validity of State Fair
Entertainment Contracts

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Honorable Penny Severns, Chairman
Senate State Government Organization
and Administration Committee
119 West William Street
Decatur, Illinois 62523

Dear Senator Severns:

I have your letter wherein you inquire regarding the legality of certain agreements between the Department of Agriculture's Division of Fairs and Horse Racing (hereinafter "the Department") and Jam Productions, Ltd. (hereinafter referred to as "Jam"), pursuant to which gate receipts from certain entertainment events held at the State Fairgrounds during the Illinois State Fair were deposited in a bank account designated by Jam rather than in the State Treasury or an account designated by the State Treasurer. For the reasons hereinafter stated, it is my opinion that those agreements

exceeded the Department's authority and violated the public policy of the State of Illinois, and were, therefore, void.

Because of the complexity of the facts concerning the agreements in question, a detailed summary of the circumstances surrounding the agreements and the actions of the parties thereto is necessary. Initially, Jam and the Department entered into a "State Fair Service Contract" that obligated Jam to procure and produce entertainment for the 1992 Illinois State Fair. Services to be provided by Jam under the contract included the negotiation of contract amounts and the processing of contracts, the provision of personnel for the production and backstage management of the Grandstand, professional marketing consulting services and technical assistance with regard to catering, theatrical lighting, stage cover and the concert sound system. Unless otherwise agreed, Jam was also to provide all tools, equipment, commodities and other tangible and intangible property necessary to provide those services. The State agreed to provide Jam with hotel rooms during the Fair, to pay travel expenses not exceeding $672 and to make a lump sum payment to Jam of $36,800 on or before August 25, 1992. In addition, Jam was entitled to receive 7.5% of the gross receipts of all novelties sold in the grandstand relating to entertainers who performed there, with gross receipts being defined as gross revenues less applicable tax. The contract also provided that it was made and must be performed in compliance with all applicable Federal, State, county and local laws,

ordinances and regulations. Jam agreed to be subject to and abide by the Department's rules, including those pertaining to the Illinois State Fair (8 Ill. Adm. Code Part 270 (1992)).

Although the contracts between the Department and the performers were not to be signed until the Department's budget was assured, eight grandstand shows were lined up for the Fair. Like those of many other agencies, however, the Department of Agriculture's budget request to the General Assembly was reduced. No reduction was made in the Department's appropriation of $478,400 for entertainment at the 1992 State Fair or the $50,000 appropriation for the percentage portion of entertainment contracts at the Fair, but substantial cuts were made in the operating budget of the Fair, including a cut of $243,800 in contractual services. (See House Bill No. 3546, and Amendment No. 2 thereto, 87th General Assembly; Public Act 87-864, article HB 3546, sections 8, 8E and 8F (1992 Ill. Leg. Serv. 475 and 477).) Among other things, the cuts reportedly affected the line items used to pay for support services essential to the staging of performances, such as sound, lights and stagehands. (Chicago Sun-Times, July 9, 1992, at 22, col. 1.)

Among the actions taken by the Department in response to the cuts were the shortening of the Fair by two days and the cancellation of two of the eight grandstand shows. The Depart-

ment also agreed to two amendments to its service contract with Jam, which took the form of attachments incorporated into the service contract. In each attachment, Jam agreed to lease the grandstand from the Department on a date specified in the attachment for the purpose of producing and presenting an entertainment act or acts. Attachment A applied to the acts commonly known as Clint Black, Billy Dean, Aaron Tippen and Little Texas, and Attachment B applied to the act commonly known as The Beach Boys. The latter was instrumental in allowing one of the two cancelled events to be rescheduled. (See, Spfld. J. Reg., July 9, 1992, at 1, col. 4 and July 15, 1992, at 1, col. 1.) Your inquiry concerns the terms of the attachments and the manner in which the terms were executed.

In addition to leasing the grandstand to Jam for the performances, the Department agreed to provide all usual and customary services and personnel necessary for the performances, "including without limitation box office, Ticketmaster, usher, stagehand, technical and security services and personnel." Jam was required to produce and provide the acts for the performances and was made responsible for refunds of ticket sale proceeds in the event that the performances were cancelled. Under the new arrangement, it was Jam, rather than the Department, that entered into the contracts with the performers and was required to pay the performers and bear the risk of loss. The compensation provision called for the State

to receive three percent of all ticket sales proceeds and for Jam to receive 97 percent of the proceeds. Under separate contract between Jam and the acts, Jam was to pay the acts 90 percent of all ticket sales proceeds. In addition, Jam's share of novelty sales proceeds was increased from 7.5 percent of post-tax receipts to 12.5 percent of pre-tax receipts. The contract also provided for Jam to designate an account in a financial institution in Springfield into which Jam's share of ticket sales would be deposited, and further provided that "[t]he State shall, as [Jam's] agent, receive and deposit [Jam's] percentage of ticket sale proceeds into the designated account * * *."

Ordinarily, the Department contracts with entertainers to perform at the State Fair and pays them from appropriated funds. Since all revenue from the operation and use of State Fair facilities must be deposited in the Agricultural Premium Fund (Ill. Rev. Stat. 1991, ch. 127, par. 1710), money from ticket sales for grandstand events, collected normally by Department employees, is deposited into that fund. The Agricultural Premium Fund is a special fund in the State Treasury (Ill. Rev. Stat. 1991, ch. 127, par. 141.01) from which expenditures can be made only pursuant to an appropriation. (Ill. Const. 1970, art. VIII, sec. 2(b); American Federation of State, County and Municipal Employees, AFL-CIO v. Netsch (1991), 216 Ill. App. 3d 566, 568.) The amount of money that

can be paid to entertainers on a percentage basis is customarily further limited by the General Assembly. Section 21 of the State Comptroller Act (Ill. Rev. Stat. 1991, ch. 15, par. 221) authorizes the Comptroller, with the approval of the State Treasurer, to provide by rule or regulation for periodic transfers to the Department of Agriculture for use in accordance with the imprest system to pay, inter alia, State Fair entertainment event percentage contracts, with the amount transferred from any fund not to exceed the appropriation for the specific purpose. The amount due a performer under a percentage contract cannot be determined until the night of the performance, and, according to the Department, performers in the entertainment industry generally require payment the night of the show. The imprest system allows money to be transferred to an account against which the Department can write a check to pay the percentage portion of an entertainment contract at that time. The Department was appropriated $50,000 for the percentage portion of entertainment contracts at the 1992 State Fair. (See Public Act 87-864, art. HB 3546, sec. 8F; 1992 Ill. Leg. Serv. 477.)

The additions to the contract had a significant fiscal impact and, as a result, the Department was able to reschedule one of the two canceled events. With respect to Clint Black and the Beach Boys, although Department employees were to continue to operate the grandstand box office and collect

ticket sale proceeds as they normally would do, the State was, according to the contract, accepting payments for tickets for the two events now being presented by Jam as an "agent" for Jam. According to Department representatives, the terms of the contract were executed as follows: Payments for tickets for all seven remaining events, including The Beach Boys and Clint Black, were made in cash, by check made out to the State of Illinois or by charge for payment to the State of Illinois. At the end of the business day, the amount due to Jam from ticket sales for The Beach Boys and Clint Black was calculated and deposited into Jam's account by Department employees. If the amount of cash paid for tickets in a given day was insufficient to pay Jam's share (as it generally was), then checks made out to the State were endorsed by a Department employee to the extent necessary to pay to Jam its share of that day's ticket sale proceeds. In this way, the performers could be paid from ticket sale proceeds that had never been paid into the State Treasury rather than from appropriated funds, and the $50,000 limitation on the percentage portion of entertainment event contracts could also be avoided. Thus, the Beach Boys' former compensation package with the State for $70,000 "up front" plus 70 percent of receipts over $100,000 could be abandoned in favor of an arrangement with Jam worth 90 percent of gate receipts (see, Spfld J. Reg., July 15, 1992, at 1, col. 1), thereby freeing up at least $70,000 of appropriated funds for other purposes.

You inquire, generally, as to the legality of the attachments to Jam's service contract and, more specifically, whether there was statutory authority for the establishment of a "special fund for Jam Productions" and whether the arrangement improperly circumvented the appropriations process.

Section 2 of the State Officers and Employees Money Disposition Act (Ill. Rev. Stat. 1991, ch. 127, par. 171) requires the Department and other State agencies to pay the gross amount of all monies received for or on behalf of the State into the State Treasury. Monies paid into the State Treasury pursuant to the statute are to be covered into the general revenue fund unless another statute requires them to be held in a separate or special fund, and monies received in the form of checks, drafts or similar instruments are to be properly endorsed, if necessary, and delivered to the State Treasurer for collection. (Ill. Rev. Stat. 1991, ch. 127, par. 171.) Section 2 applies only to the receipt of monies "for or on behalf of the State". The apparent theory of the Department's agreements with Jam was that the Department was, under the contract, accepting payments for the two events presented by Jam only as an agent for Jam. Under that rationale, the ticket sale proceeds for those events were not monies received for or on behalf of the State, and section 2 would not, in theory, require their deposit in the State Treasury.

In my opinion, however, the contract in question was void.

It is well established that an administrative agency is a creature of statute and possesses no general or common law powers; its authority must arise either from the express language of its enabling statute or devolve by fair implication and intendment from express provisions of statute as an incident to achieving the objectives for which the agency was created. (Peoples Gas Light and Coke Co. v. Illinois Commerce Commission (1987), 165 Ill. App. 3d 235, 246.) Any of an agency's acts or orders that are unauthorized by its enabling statute are void. (Homefinders, Inc. v. City of Evanston (1976), 65 Ill. 2d 115, 129.) Consistent with these principles are cases of other jurisdictions which deal more specifically with the power of administrative agencies and public officers to contract. Those cases hold that no State officer can enter into a valid contract without first having been delegated that power by the State Constitution or the legislature. (Aetna Insurance Co. v. O'Malley (1938), 343 Mo. 1232, 124 S.W.2d 1164, 1166; Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, 17 P.2d 365, 368; Wadsworth v. State (1932), 225 Ala. 118, 142 So. 529, 531.) The State is not bound by an officer's contract unless the subject matter of the contract is within the scope of the authority conferred upon the officer. (Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, 17 P.2d 365, 368; Jordan v. Iowa Department of Transportation (Iowa 1991), 468 N.W.2d 827, 831.) Not only the subject matter, but

the mode of contracting may also be limited by statute, and a contract made in disregard of the prescribed mode is also invalid. (Seymour v. State (1984), 156 Cal. App. 3d 200, 201 Cal. Rptr. 15, 16; Rustrum Realty, Inc. v. Commonwealth (1978), 35 Pa. Comw. 62, 384 A.2d 1043, 1046.) The superintendent's agreement on behalf of the Department, to lease the grandstand to Jam and to act as agent for Jam, fails for these reasons.

Sections 6 and 7 of the State Fair Act (Ill. Rev. Stat. 1991, ch. 127, pars. 1706 and 1707) provide, in pertinent part:

> "§6. The Department shall by rule establish the policy for the operation of the Illinois State Fair and the DuQuoin State Fair and shall set policies and procedures for ticket refunds for cancelled events.
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> The Department shall establish and publish for the Illinois State Fair and the DuQuoin State Fair a schedule of admission fees, entry fees, concession fees, space rentals and other fees for activities offered or provided at each State Fair. * * * The Department may negotiate and enter into contracts for activities and use of facilities for which there is not an established or published schedule. The criteria for such contracts shall be established by rule.
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> §7. During the period when each State Fairgrounds is not used for the annual State Fair, the Department shall make all efforts to promote its use by the public for purposes that the facilities can accommodate. The Department may charge and collect for the use of each State Fairgrounds and its facilities. The Department may negotiate and enter into contracts for activities and use of facilities. The criteria for such contracts shall be established by rule."

Implementing these provisions, and others, are the rules of the Department entitled "Illinois State Fair and DuQuoin State Fair, Non-Fair Space Rental and the General Operation of the State Fairgrounds". (8 Ill. Adm. Code Part 270 (1991).) These rules do not, however, appear to establish any criteria or otherwise provide for leasing the grandstand during the running of the State Fair. Subpart J of the rules, "Non-Fair Space Rental: Basic Rules Applicable to All Rentals" (8 Ill. Adm. Code 270.375 et seq.), makes Illinois State Fair facilities, presumably including the grandstand, available for rental from September 1 through July 15 to persons who comply with prescribed procedures and conditions, but these rules do not apply during the State Fair. The rules also provide for space rental to concessionaires and exhibitors during the State Fair (8 Ill. Adm. Code 270.25 et seq.), but these rules do not appear to apply to the leasing of the grandstand, despite the fact that the grandstand is, according to the Department, a facility for which there is not an established or published schedule. For purposes of these rules, a "concessionaire" is a person who makes available goods or services for the public and an "exhibitor" is one who displays his or her goods or person or who participates in programs offered by the Department. (8 Ill. Adm. Code 270.10.) The rules appear to be designed to apply to the traditional types of concession and exhibition

space. One rule, for example, requires that all exhibits and concessions be ready by 8:00 a.m. on the opening day of the fair. (8 Ill. Adm. Code 270.140.) Although it is arguable that the rules might also apply to grandstand rental, it is clear that the Jam contract violated those rules in significant respects even if the rules are so construed. Jam apparently filed no application for space rental despite the requirement of 8 Ill. Adm. Code 270.40 that applications for space rental during the Fair be submitted no later than April 1, 1992, and space was not awarded to Jam in accordance with the procedures set forth in that rule. Rental of space for three percent of gross sales would directly violate 8 Ill. Adm. Code 270.150, which provides that "in no case" shall the percentage rate payable to the State under a percentage rental contract be less than 15% of the gross sales.

Thus, depending upon the theory applied, the contract was made despite the lack of statutorily required criteria for making such contracts, or in direct violation of those criteria. In either event, the making of the contract exceeded the authority granted to the Department and was void.

The subject matter of the contract also was beyond the Department's authority because the Department had no authority to act as Jam's agent in such circumstances. An agency relationship is a consensual fiduciary relationship whereby the principal has the right to control the conduct of the agent,

and the agent has the power to effect the legal relations of the principal. (Milwaukee Mutual Insurance Co. v. Wessels (1983), 114 Ill. App. 3d 746, 749.) A true agency requires that the agent's function be the carrying out of the principal's affairs. (Clapp v. JMK/Skewer, Inc. (1985), 173 Ill. App. 3d 469, 472.) The test of agency is the existence of the principal's right to control the method or manner of accomplishing a task by the alleged agent, and of the agent's ability to subject the principal to liability. Wargel v. First National Bank (1984), 121 Ill. App. 3d 730, 736.

A State acts through its agencies, and the agencies' acts are those of the State. (State Office Building Commission v. Trujillo (1941), 46 N.M. 29, 120 P.2d 434, 440.) The agencies represent the general public (Hartwig Moss Insurance Agency v. Board of Commissioners (1944), 206 La. 395, 19 So. 2d 178, 182) and act in the public interest. (New York State Labor Relations Board v. Holland Laundry (1945), 294 N.Y. 480, 63 N.E.2d 68, 75.) Making itself an agent of Jam, however, would require the Department to carry out Jam's affairs and be subject to Jam's control. Neither the State Fair Act (Ill. Rev. Stat. 1991, ch. 1701 et seq.) nor that portion of the Civil Administrative Code of Illinois that bestows general powers on the Department (Ill. Rev. Stat. 1991, ch. 127, par. 40 et seq.) either expressly or impliedly grants to the Department the authority to place itself (and the State) in

such a subservient relationship to a private contractor as an agency relationship requires. The Illinois State Fair is conducted partly for the purpose of providing entertainment for the people of Illinois (see Ill. Rev. Stat. 1991, ch. 127, pars. 1703, 1704), but the Department can and has fulfilled that purpose without the necessity of making itself an agent of a private contractor. The language of the pertinent statutes does not suggest that the Department would have the power to do so, and I do not believe the power is necessarily implied. It is my opinion, therefore, that the Department acted beyond its authority in purporting to act as an agent of Jam for the purpose of selling tickets and collecting money for Jam.

Even if the Department had entered into this contract in accordance with properly adopted rules and had the authority to act as Jam's agent, however, it is my opinion that the contract would be void as being contrary to public policy. It is axiomatic that contracts and agreements should not be enforced when they are contrary to public policy. (People ex rel. Reinhart v. Herrin (1918), 284 Ill. 368, 373.) The term "public policy" means the principle of law "which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." (People ex rel. Reinhart, 284

Ill. at 373.) In Schnackenberg v. Towle (1955), 4 Ill. 2d 561, 565, cert. denied, 349 U.S. 939, 75 S. Ct. 785, the court stated:

" * * *

> There is no precise definition of public policy, and consequently no absolute rule of admeasurement, making it necessary to judge and determine each case, as it arises, according to its own peculiar facts and circumstances. It has often been said that the public policy of the State is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of government officials. Courts will not look to other sources to determine the public policy of a State. * * *
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> * * * "

A contract is void as against public policy if it is injurious in some way to the interests of society. Steen v. Modern Woodmen (1921), 296 Ill. 104, 118.

Pursuant to section 1(b) of article VIII of the Illinois Constitution, the State may incur obligations for payment or make payment from public funds only as authorized by law. Section 2(b) of article VIII of the Constitution provides that the General Assembly shall make appropriations by law for all expenditures of public funds by the State. Thus, the clear policy of the State, as expressed in its Constitution, is that the General Assembly possesses the power and the duty to determine the amounts and objects of the expenditure of State funds, and that the agencies of the State may expend State monies only as

authorized by the General Assembly. In this case, the General Assembly appropriated an amount deemed by the Department to be insufficient to fund the full program of entertainment it had arranged, and a statute limited the percentage portions of entertainment contracts to that which had been appropriated for that purpose. (Ill. Rev. Stat. 1991, ch. 15, par. 221.) The purpose of the amended agreement, was, regardless of the motive, to avoid these limitations and restrictions imposed by law. It is well established that a party cannot lawfully circumvent the application of a statute by doing indirectly what it cannot do directly. In re Petition of Kildeer (1988), 124 Ill. 2d 533, 546.

In fact, a review of the agreement, its execution and Department practice suggests that the contract amendment amounted to a virtual sham. As previously noted, the Department's rules do not appear to provide for rental of the grandstand during the State Fair, but the Department's Non-fair Space Rental rules are useful for comparison. Pursuant to those rules, a lessee is required to furnish all necessary tickets at its own expense subject to Departmental examination of tickets and the ticket manifest before sale. The lessee must provide all ticket sellers and ticket takers at its expense, and the lessee must make an accounting, including a manifest of all tickets sold and unsold, within three days following the conclusion of the event. (8 Ill. Adm. Code

270.415.) Where a percentage contract is involved, full reconciliation must also be made by the lessee within three days. (8 Ill. Adm. Code 270.420.) The lessee is responsible for providing security (8 Ill. Adm. Code 270.430), and all rental agreements must contain a provision making the lessee responsible for cleaning up after the event (8 Ill. Adm. Code 270.445). The lessee must obtain public liability insurance in amounts specified by the Department, the Department is not liable for damage to the lessee or lessee's property, and the lessee is made liable for injuries sustained by the public or to Department property. (8 Ill. Adm. Code 270.455.) It is apparent that, in the case of the ordinary lessee, the Department does not participate in the presentation of the event or act as an agent for the lessee.

In contrast, under the Jam amendments the Department agreed to provide box office services, Ticketmaster, ushers, stagehands, technical and security services and personnel, and any other usual and customary services and personnel necessary for the performance. The Department was required to collect ticket money, determine Jam's share and pay it to Jam. The Department also purported to agree to indemnify and hold Jam harmless from any liability in connection with the performance "to the extent authorized under Illinois law". The Department-staffed box office sold tickets to all events without regard to whether Jam or the Department had contracted

with the performers. Not only were funds commingled, but tickets for Jam events were paid for with checks or charges payable to the State of Illinois, and a single check could be written to pay for tickets for both Department and Jam produced events.

Unless it is undisputed, the existence of an agency relationship is a question of fact to be determined by the trier of fact. (Milwaukee Mutual Insurance Co. v. Wessels (1983), 114 Ill. App. 3d 746, 749.) The existence of an agency may be shown, even if by circumstantial evidence, by reference to the parties' situation and acts. (Lang v. Consumers Insurance Service, Inc. (1992), 222 Ill. App. 3d 226, 232.) The determination of the relationship of the parties is not concluded by the terms used by the parties to designate themselves. (Hartley v. Red Ball Transit Co. (1931), 344 Ill. 534, 541.) As noted above, a true agency requires that the agent's function be the carrying out of the principal's affairs. Lang v. Consumers Insurance Service, Inc. (1992), 222 Ill. App. 3d 226, 232.

In these circumstances, it appears that if either party was an agent of the other, it was Jam who acted as the Department's agent and not the converse. The Department had the authority to provide for entertainment at the State Fair and had, in its original service contract, engaged the services of Jam to locate entertainment and to negotiate contracts on the Department's behalf. Under the agreement, the Department

was to provide the services and premises necessary to put on the event and was to provide and sell tickets and collect money with respect to Jam's events just as it did with respect to its own. In addition, the contract contemplated that the Department would be liable for resultant injuries rather than Jam, another sign that the Department was the true principal, if an agency relationship existed. The money for tickets was paid to the State and funneled outside the State Treasury to an account held by Jam simply so that it could be paid to the entertainers in excess of amounts appropriated for that purpose. The ticket sale proceeds were clearly received "for or on behalf of the State", for purposes of section 2 of the State Officers and Employees Money Disposition Act, and the agreement was contrary to public policy. That this arrangement was injurious to the interest of society is clear, for "[a] people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments." Schnackenberg v. Towle (1955), 4 Ill. 2d 561, 568, cert. denied 349 U.S. 939, 75 S. Ct. 785.

The agreement was, therefore, also void as being contrary to public policy. Consistent with this conclusion is the opinion of my predecessor, Attorney General Scott, who, in opinion No. S-1147, issued August 20, 1976 (1976 Ill. Att'y

Gen. Op. 278), advised that a procedure whereby a State agency would pay proceeds from a patent directly to a State employee pursuant to an agreement to share royalties was invalid because of the requirement that all monies received by the agency were required to be paid into the State Treasury.

As a final matter, I call your attention to section 2a.2 of the State Officers and Employees Money Disposition Act (Ill. Rev. Stat. 1991, ch. 127, par. 172b), which provides, in pertinent part:

> "No officer or employee of this State shall create or maintain or participate in a trust fund or bank or savings and loan association deposit of any money received by him by virtue of his office or employment except as provided by law.
> * * *
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> If any such officer or employee receives or has in his possession money under conditions which do not require payment thereof into the State Treasury, and there is no trust fund or bank or savings and loan association deposit authorized by law for the receipt thereof, he may, upon the written approval of the Governor and the State Comptroller establish a temporary trust fund or bank or savings and loan association deposit which shall be legal until the thirtieth day after the sine die adjournment of the next regular session of the General Assembly. A copy of such written approval shall immediately be forwarded by the Comptroller to the Auditor General.
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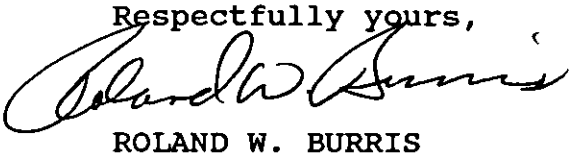
> * * * If such General Assembly does not, by law, authorize the continuance of the trust fund or bank or savings and loan association deposit so required to be reported, the money in such temporary trust fund or bank or savings and loan association deposit shall be deposited in the general revenue fund in the State Treasury."

Even if it could be successfully argued that the ticket sale proceeds deposited in Jam's account were not monies required to be deposited into the State Treasury, section 2a.2 would permit deposit in a temporary account only with the written approval of the Governor and Comptroller. Such approval was not obtained in this case, and, in any event, that money could be expended only pursuant to a grant of authority from the General Assembly. Moreover, it also is my opinion that requiring a private corporation by contract to open an account in its name to receive deposits of money received by State employees by virtue of their employment would constitute participation in a bank deposit prohibited by section 2a.2.

Therefore, in conclusion, it is my opinion that the agreements entered into by and between the Department of Agriculture and Jam Productions for the performances in question were void because they exceeded the authority granted to the Department, violated public policy and were violative of sections 2 and 2a.2 of the State Officers and Employees Money Disposition Act.

Respectfully yours,



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ATTORNEY GENERAL