PENSIONS, BENEFITS AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM — GOVERNMENT EMPLOYEES DEFERRED COMPENSATION PLAN ACT — VOLUNTEER FIREFIGHTERS’ AND RESCUE SQUAD WORKERS’ SERVICE AWARD FUND.

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW.

Appropriation Act provides no authorization for payment of administrative expenses incurred by Virginia Retirement System in oversight of deferred compensation plan; no statutory authorization for Retirement System to charge and recover administrative costs from Department of Accounts. Retirement System may not recover its administrative expenses from employees who participate in cash match plan, but may bill participating employers for expenses. No authority for Retirement System to charge and collect administrative fee from participants of optional retirement plan for political appointees or recover such costs from institutions of higher education. Attorney General is unable to comment regarding method and source by which Virginia Retirement System may recover costs incurred and associated with administration of VolSAP when Fund assets are insufficient, or on action Retirement System should take for optional retirement plan for school superintendents should General Assembly deny request for general fund appropriation.

Mr. W. Forrest Matthews, Jr.
Director, Virginia Retirement System
April 29, 2002

You inquire regarding the recovery of Virginia Retirement System administrative expenses incurred in connection with the establishment and administration of certain defined contribution plans created by the General Assembly.

Background

You explain that, in addition to defined benefit plans, the Virginia Retirement System administers, or has substantial oversight responsibilities for, several defined contribution plans. These plans include the deferred compensation plan, §§ 51.1-600 through 51.1-606 of the Code of Virginia, and the cash match plan, § 51.1-606; the optional retirement plans for political appointees, § 51.1-126.5, and employees of institutions of higher education, § 51.1-126; and the Volunteer Firefighters’ and Rescue Squad Workers’ Service Award Fund, §§ 51.1-1200 through 51.1-1211.

You advise that the defined benefit plans are funded by contributions paid into the trust fund and by income generated from investments of the trust fund corpus. You also advise that the trust fund pool of money is available for payments of the benefits earned by members who have contributed to the trust, and to pay the costs of administering the plan. You relate, however, that the defined contribution plans are funded by money specifically designated by each member and within each fund. Furthermore, you advise that accounts of each
member, including all investment income generated, remain segregated. Therefore, the defined contribution plans do not have a general source of funds from which administrative costs incurred by the Virginia Retirement System may be paid.

You relate further that § 51.1-126(D) requires the Virginia Retirement System to "develop policies and procedures for the administration of all retirement plans established [for employees on institutions of higher education]." You observe that § 51.1-124.30(C) directs the Board of Trustees of the Virginia Retirement System to discharge its duties solely in the interest of the beneficiaries of the plan. Furthermore, you relate that the Board is instructed that, while it "may invest the assets of any retirement system or program it administers on a pooled or consolidated basis … [it] shall maintain a separate accounting of the funds of each of the retirement systems and programs."

You advise that, in order to cover the cost of administering the deferred compensation plan, the Virginia Retirement System established a procedure whereby each participant would be charged an annual administrative fee. Initially, the administrative fee, set at $12, was charged against the account of each participant in January of each year. The 2000 Session of the General Assembly changed this procedure by amending § 51.1-602(A) to provide that the "[a]dministrative fees related to the VRS program oversight that otherwise would be charged to an employee participating in the plan shall be paid by the participating employer under procedures established by the Board." You advise that, pursuant to the procedures established by the Board, the Retirement System has determined the "per participant" share of its administrative expenses, and has sent an invoice to each participating employer requesting payment in that amount which otherwise would have been charged to its employees. You further state that some participating employers have paid these invoices while others have not.

You further advise that the Commonwealth of Virginia has not paid the amount billed on its invoice (approximately $342,000). You believe the state’s failure to pay may be related to the failure of the 2001 Session of the General Assembly to approve budget amendments. Finally, you provide an opinion letter from your outside counsel advising that the facts described above present serious constitutional and tax issues for the Retirement System. The constitutional issue presented by your outside counsel is that the Retirement System has no authority to use defined benefit plan assets to pay administrative expenses for other plans. Similarly, the tax issue raised by your outside counsel relates to using defined benefit plan assets to pay administrative expenses. In your counsel’s opinion, this may result in the plans being disqualified for failing to satisfy the "exclusive benefit rule" of § 401(a) of the Internal Revenue Code. Your outside counsel concludes that, unless the Retirement System has the authority to pay for the administrative costs related to the defined contribution plans, it must either decline to administer the plans or operate the plans in violation of the Internal Revenue Code.

**First Issue Presented**

**The Deferred Compensation Plan**

Your first inquiry is whether the Virginia Retirement System may charge the Department of Accounts for the administrative fees that previously were charged
to all employees of the Commonwealth prior to the 2000 amendment to § 51.1-602(A).

Response

I cannot conclude that the Retirement System may charge the Department of Accounts for the administrative fees that previously were charged to all participating employees of the Commonwealth before the 2000 amendment.

Discussion

In responding to your inquiry, it is necessary that I apply the pertinent rules of statutory construction to the applicable statutory provisions governing the matter. "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."4 "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."5 Another "settled principle of statutory construction [is] that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."6 Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.7

The specific deferred compensation plan to which you refer is established and administered "for employees of the Commonwealth and its agencies."8 Therefore, the "participating employer" of such employees is the Commonwealth of Virginia. In my view, the purpose of § 51.1-602 is to authorize the Retirement System to bill the Commonwealth for the expenses that previously were paid by participating employees. There is no statutory authorization which allows the Virginia Retirement System to bill the Department of Accounts. To interpret current law to authorize such action would be contrary to the clear intent of the legislature as expressed in the 2000 amendment to § 51.1-602(A).

Chapter 6 of Title 51.1, §§ 51.1-600 through 51.1-606, establishes the Government Employees Deferred Compensation Plan Act. Section 51.1-602(A) requires that "[t]he Board shall establish and administer a deferred compensation plan for employees of the Commonwealth and its agencies." The last sentence of § 51.1-602(A) provides that "[a]dministrative fees related to the VRS program oversight that otherwise would be charged to an employee participating in the plan shall be paid by the participating employer under procedures established by the Board." Section 51.1-600 defines the term "participating employer," as used in the Act, to mean

the Commonwealth or any political subdivision that has elected pursuant to § 51.1-603.1 to participate in the deferred compensation plan established by the Board pursuant to this chapter or a sponsor of a plan established pursuant to § 403(b) of the Internal Revenue Code of 1986, as amended.

In addition to the 2000 amendment, the 2000 Session of the General Assembly amended the Appropriation Act for the 1998-2000 biennium.9 Part of the amended Appropriation Act contains line item appropriations for individual state departments, agencies, institutions and programs.10 Section 1-133 contains "Central Appropriations" intended to be transferred for various purposes to supplement appropriations to other agencies.11 Item 546(A)(5) within this section
is an appropriation for "[e]mployer costs of employee benefit programs when required by salary-based pay adjustments."\textsuperscript{12} Furthermore, Item 546.10(A) is an appropriation authorizing the Governor "to transfer funds from agency appropriations to the accounts of ... state employees" participating in the deferred compensation plan authorized by § 51.1-606.\textsuperscript{13} In addition, the 2000 General Assembly enacted the Appropriation Act for the 2000-2002 biennium.\textsuperscript{14} Similar line item appropriations are included in the 2000 Appropriation Act to supplement employer contributions to employee benefit programs and employer match of employee contributions consistent with § 51.1-606.\textsuperscript{15} I can, however, find no authorization in either of these appropriation measures that provides for the payment of administrative expenses incurred by the Virginia Retirement System in the oversight of the deferred compensation plan. In addition, I can find no statutory authorization for the Retirement System to charge and recover such costs from the Department of Accounts.

Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.\textsuperscript{16} The General Assembly has not imposed a requirement on the Department of Accounts to pay any administrative expenses incurred by the Retirement System. When the General Assembly intends a statute to impose requirements, it knows how to express its intention.\textsuperscript{17} Accordingly, I cannot conclude that the Virginia Retirement System may charge the Department of Accounts for the administrative fees previously charged to all participating employees of the Commonwealth prior to the 2000 amendment amending § 51.1-602(A).\textsuperscript{18}

Second Issue Presented

The Cash Match Plan

Next, you advise that the Virginia Retirement System has established a cash match plan under § 51.1-606 of the Government Employees Deferred Compensation Plan Act. You ask whether participating employers or employees who participate in the cash match plan may be charged the "[a]dministrative fees related to the VRS program oversight."\textsuperscript{19}

Response

I must conclude that the General Assembly does not intend for the Virginia Retirement System to recover its administrative expenses from employees who participate in the cash match plan. The Retirement System, however, is authorized to bill participating employers for these expenses.

Facts and Discussion

You explain that all participants in the cash match plan are also participants in the deferred compensation plan, although not all members of the deferred compensation plan participate in the cash match plan. You explain that the cash match and the deferred compensation plans are segregated plans in that each plan exists pursuant to a separate trust document and is governed by an independent plan document.

Section 51.1-606(A) authorizes the Department of Accounts, "on behalf of the Commonwealth, ... or any agency of the Commonwealth not covered under the
central payroll system," to transfer funds matching the employees’ voluntary contribution. The cash match plan is coupled with the deferred compensation plan established under § 51.1-602. The cash match plan is applicable to "any agency of the Commonwealth not covered under the central payroll system." Statutes relating to the same subject should be considered in pari materia.

The cash match plan is also established under the Government Employees Deferred Compensation Plan Act. The provision in § 51.1-602(A), requiring that administrative fees be paid by participating employers, is also applicable to the cash match plan, because it is essentially the same plan as that established pursuant to § 51.1-602. Therefore, I must conclude that the General Assembly does not intend for the Virginia Retirement System to recover its administrative expenses from the participating employees in the cash match plan. The Retirement System, however, is authorized to bill participating employers for these expenses. The same rules applicable to the deferred compensation plan are also applicable to the cash match plan.

Third Issue Presented

The Optional Retirement Plan for Political Appointees

You ask whether the Virginia Retirement System has authority to charge the participants of the optional retirement plan for political appointees ("plan participants") an administrative fee, absent specific statutory prohibitions to the contrary.

Response

I must conclude that the Virginia Retirement System does not have the authority to charge plan participants an administrative fee.

Facts and Discussion

You advise that the optional retirement plan for political appointees is established pursuant to the requirements of § 51.1-126.5. You note that § 51.1-126.5(G) requires that "[c]ontributions to the defined contribution account and all earnings thereon shall be credited to an account to be maintained for each participating member." You also observe that § 51.1-126.5(H) requires the Retirement System to "develop policies and procedures for the administration of the plan," but is silent as to the issue of recovery of costs incurred in the administration of this plan.

Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. Statutes are also to be read as a whole rather than in isolated parts. It is further an accepted principle of statutory interpretation that the mention of one thing implies the exclusion of another. Nowhere in § 51.1-126.5, or anywhere else in the statutes delineating the authority of the Virginia Retirement System, is there a grant of authority permitting the Retirement System to charge and collect an administrative fee from participants in the optional retirement plan for political appointees.

Consequently, I must conclude that the Virginia Retirement System does not have the authority to charge plan participants an administrative fee.
Fourth Issue Presented

The Optional Retirement Plan for Employees of Institutions of Higher Education

You next inquire regarding the optional retirement plan for employees of institutions of higher education. You ask whether the Virginia Retirement System, as a state agency, has the authority to recover administrative costs from the institutions of higher education for which it provides such services.

Response

I must conclude that the General Assembly has not specifically authorized the Virginia Retirement System to recover its administrative costs from the institutions of higher education.

Facts and Discussion

You advise that § 51.1-126(D) mandates that "[t]he Virginia Retirement System shall develop policies and procedures for the administration of all retirement plans established" for employees of institutions of higher education. You relate that the Retirement System is permitted to appoint an advisory committee to assist with the task of developing such policies and procedures. You note, however, that § 51.1-126 is silent as to the manner in which the Retirement System may be paid or reimbursed for the administrative costs incurred in fulfilling its statutory directives.

The General Assembly provides funds for the operating expenses of the agencies of the Commonwealth through Appropriation Acts. Part 1 of the 2000 Appropriation Act sets forth the operating expenses allowed for state agencies, including the Retirement System. An appropriated sum is set forth for each fiscal year for the Retirement System, and categorized as "Administrative and Support Services." I can find no specific statutory provision or Appropriation Act provisions authorizing the Virginia Retirement System to recover administrative costs from the institutions of higher education for which it provides such services. Accordingly,. I must conclude that the General Assembly has not specifically authorized the Virginia Retirement System to recover its administrative costs from the institutions of higher education.

Fifth Issue Presented

The Optional Retirement Plan for School Superintendents and Volunteer Firefighters’ and Rescue Squad Workers’ Service Award Program

Your last two inquiries regard how and from what source administrative expenses incurred by the Virginia Retirement System in developing policies and procedures for administration of the optional retirement plan for school superintendents and the Volunteer Firefighters’ and Rescue Workers’ Service Award Program ("VolSAP") may be recovered.

Response

Consistent with the historical practice of prior Attorneys General, I am unable to comment on how and from what source the Virginia Retirement System may
recover the costs incurred and associated with the administration of VolSAP when there are not sufficient assets in the VolSAP Fund to do so. For the same reasons, I am also unable to comment on what action the Retirement System should take for the optional retirement plan for school superintendents in the event that a request for a general fund appropriation is denied by the General Assembly.

Facts and Discussion

You advise that the General Assembly establishes VolSAP in Chapter 12 of Title 51.1.30 In establishing VolSAP, you note that the General Assembly assigned to the Board of Trustees of the Virginia Retirement System the responsibility of administering and managing the investment of the VolSAP Fund as custodian and also requires the Board to provide staff to carry out the provisions of Chapter 12.31 In addition, you observe that § 51.1-1201(A) requires that the Director of the Virginia Retirement System be appointed to serve as a member and act as chairman of the VolSAP Board. You note that provision is made for the VolSAP Fund to reimburse the Retirement System for all costs incurred and associated, directly or indirectly, with the administration of the program and management and investment of the Fund.32 The VolSAP Board, or its designee, is also authorized to request such general fund appropriations as are necessary to maintain the Fund.33

You advise further that a general appropriation of $100,000 was made by the General Assembly for the Retirement System to establish the Fund. You also advise that the administrative costs and expenses of the program have exceeded $100,000. You relate that the Fund assets are insufficient to recompense the Retirement System for its administrative expenses. Finally, you do not know whether the General Assembly will appropriate any additional funds to compensate the Retirement System for the costs associated with establishing the VolSAP Fund.

In the event that a request for a general fund appropriation is denied by the General Assembly, you ask how and from what source the Virginia Retirement System may recover the costs incurred and associated, directly and indirectly, with the administration of VolSAP, and the management and investment of the VolSAP Fund when the Fund assets are insufficient to do so.

Article V, § 15 of the Constitution of Virginia provides that the Attorney General of Virginia "shall perform such duties … as may be prescribed by law." Historically, the Office has limited responses to requests for official opinions to matters that concern an interpretation of federal or state law, rule or regulation.34 The constitutional provision declaring that the Attorney General shall perform such duties as may be prescribed by law is implemented by those sections of the Virginia Code that define the various duties of the Office.35 Section 2.2-505 articulates the authority of the Attorney General of Virginia to render official legal opinions. It is acknowledged that official opinions of the Attorney General must be confined to matters of law.36 The questions that you raise for these two plans are accounting issues and do not concern official legal issues.

Accordingly, consistent with the historical practice of prior Attorneys General, I am unable to comment on how and from what source the Virginia Retirement System may recover the costs incurred and associated with the administration of VolSAP when the assets in the VolSAP Fund are insufficient to do so. For the same reasons, I am also unable to comment on what action the Retirement
System should take for the optional retirement plan for school superintendents in the event the General Assembly denies a request for a general fund appropriation.


3The "exclusive benefit" rule states that plan assets are to be used only for the benefit of "employees and their beneficiaries under the trust" or "covered by the trust." I.R.C. § 401(a)(2); Treas. Reg. § 1.401-2(a)(3) (2001).


9See 2000 Va. Act ch. 1072, at 2617

10Id. at 2620-3114.

11Id. at 3063-96.

12Id. at 3063.

13Id. at 3077.


15See id. Item 547(A)(6), at 3629; Item 549(A), at 3643.


18Since I conclude that there are no statutory provisions or authorization in the Appropriation Act permitting the Virginia Retirement System to charge the Department of Accounts for the administrative expenses incurred in administering such plans, I need not consider your question regarding any recourse available to the Retirement System should Department be unwilling to remit payment in response to any invoices submitted. Attorneys General
consistently have declined to render official opinions pursuant to § 2.2-505 when
the request does not involve a question requiring interpretations of law. See, e.g.,
1977-1978 at 31, 33. Accordingly, I must similarly decline to respond regarding
any recourse available to the Retirement System should the Department of
Accounts be unable to remit payment in response to any invoices submitted.

19Section 51.1-602(A).
21Id. § 51.1-606(A).
22See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8
meaning “[o]n the same subject; relating to the same matter.” Black’s Law
23See sources cited supra note 16.
1996 at 26, 27; 1994 at 93, 95; 1985-1986 at 177, 178.
25See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Tate v.
Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Singer, supra note 16
(explaining maxim, expressio unius est exclusio alterius).
28Id. at 3649.
29As we discussed earlier, there is a specific statutory authorization to recover
such costs from participating employers for the deferred compensation plan and
2001).
31See § 51.1-1200.
32Id.
33See § 51.1-1202.
2001) (“Department of Law”).

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