

OPINION NO. 90-031**Syllabus:**

1. A dog warden or poundkeeper has discretionary authority, pursuant to R.C. 955.16(B) and (C), to destroy an impounded dog without first offering the dog for sale to a qualified teaching or research facility which has requested dogs.
2. If, pursuant to R.C. 955.16(B), a dog warden or poundkeeper offers an impounded dog to a requesting qualified teaching or research facility, the warden or poundkeeper is required by R.C. 955.16(C) to hold the dog for an additional twenty-four hours before the dog may be destroyed.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 25, 1990

I have before me your request for my opinion regarding the sale of impounded dogs to teaching and research facilities pursuant to R.C. 955.16. Specifically you wish to know whether R.C. 955.16 imposes a mandatory requirement to offer dogs to teaching or research facilities before the dogs may be destroyed or whether the decision to sell or to destroy a dog is purely discretionary.

I will begin with a brief outline of the overall system for the disposition of impounded dogs that is established in R.C. 955.16. R.C. 955.16(A) first provides that a dog "shall" be kept for the applicable holding period¹ in order to give its owner time to redeem it pursuant to R.C. 955.18. If the dog is not redeemed within the required holding period and if a special agency which trains assistance dogs for handicapped persons requests the dog, the dog "shall" be donated to that agency. R.C. 955.16(A). If the required holding period has expired and if no special training agency has requested the dog, R.C. 955.16(A) next provides that a dog "may" be sold to a person or to a certified teaching or research facility. R.C. 955.16(B), which repeats the language "may be sold," describes the conditions of sale to a teaching or research facility. R.C. 955.16(C) finally provides that any dog that the dog warden or poundkeeper is "unable to dispose of" by these preceding options "may" be destroyed, except that "no dog *shall* be destroyed until twenty-four hours after it has been offered" to a requesting teaching or research facility. (Emphasis added.) Further, a dog owner who presents a dog to the dog warden or poundkeeper may, pursuant to R.C. 955.16(D), specify in writing that the dog shall not be offered to a research facility.

As the above outline indicates, R.C. 955.16 establishes a sequence in which each succeeding method for disposition of a dog becomes available upon the nonoccurrence of its predecessors. Your question arises because of the ambiguity created by the combination of mandatory and discretionary language throughout R.C. 955.16 and the sequential nature of the dispositional options. The language of particular concern appears in R.C. 955.16(B) and (C), which states in pertinent part:

(B) Any dog that is not redeemed within the applicable period..., and that is not required to be donated to a nonprofit special agency engaged in the training of guide, leader, hearing, or support dogs *may*, upon payment to the dog warden or poundkeeper of the sum of three dollars, *be sold* to any nonprofit Ohio institution or organization that is certified by the Ohio public health council as being

¹ The basic holding period under R.C. 955.16(A) is three days. A dog may be destroyed immediately, however, if "necessary because of obvious disease or injury," R.C. 955.16(A)(1). Additionally, the holding period may be extended under circumstances described in R.C. 955.16(A)(2) and (A)(3).

engaged in teaching or research concerning the prevention and treatment of diseases of human beings or animals.

....
 (C) Any dog that the dog warden or poundkeeper is unable to dispose of, in the manner provided by this section and section 955.18 [owner redemption] of the Revised Code, *may be humanely destroyed, except that no dog shall be destroyed until twenty-four hours after it has been offered to a nonprofit teaching or research institution or organization, as provided in this section, that has made a request for dogs to the dog warden or poundkeeper.* (Emphasis added.)

In interpreting these provisions, I am guided by the rule of statutory construction that statutory use of the word "may" indicates a grant of discretionary authority and use of the word "shall" indicates mandatory authority, unless the context of the statute clearly requires a different meaning. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one). I note further that the contrasting use of "shall" and "may" in the same section of the Revised Code, is understood to "clearly reflect a legislative intent that the two word be given their usual statutory construction." *Id.* at 108, 271 N.E.2d at 838. *Accord State ex rel. John Tague Post v. Klinger*, 114 Ohio St. 212, 214, 151 N.E. 47, 48 (1926) (contrasting use of "shall" and "may" with respect to different acts in the same statute "would seem to indicate that the Legislature intended to discriminate between that which was permissive or discretionary and that which was mandatory in the carrying out of its intention"); *State ex rel. DeWoody v. Bixler*, 136 Ohio St. 263, 269, 25 N.E.2d 341, 344 (1940).

Such contrasting usage of "shall" and "may" is apparent throughout R.C. 955.16. R.C. 955.16(A), which authorizes the sale of dogs generally, states that dogs "may" be sold. R.C. 955.16(B), which deals specifically with the sale of dogs to qualified teaching and research facilities, also states that dogs "may" be sold. In addition, R.C. 955.16(C) states that dogs "may" be destroyed. This language stands in direct contrast to the mandatory language used with respect to other actions involved in the disposition of impounded dogs. R.C. 955.16(A), for example, states that dogs "shall" be kept at least three days for owner redemption. R.C. 955.16(A) also states that "any dog not redeemed *shall* be donated "to any requesting special agency that trains dogs to assist persons with handicaps." (Emphasis added.)² Lastly, in the phrase that gives rise to your question, R.C. 955.16(C) states that "no dog *shall* be destroyed until twenty-four hours after it has been offered to a qualified requesting research facility, as provided in this section, that has made a request...." Thus, the contrasting use of "shall" and "may" indicates that these latter actions are mandatory, but that the sale or destruction of a dog are discretionary.

Because the twenty-four hour exception clause of R.C. 955.16(C) is mandatory, it is possible to interpret this clause, when read standing alone, as a requirement that a dog be offered to a qualified requesting research facility before it may be destroyed, with the effect of making a sale to such a facility mandatory. I am constrained by the rules of statutory construction, however, to seek an interpretation which will give effect to both the discretionary and the mandatory aspects of R.C. 955.16. See R.C. 1.47(B) ("entire statute is intended to be effective"). See generally *Humphrys v. Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780 (1956) (syllabus, paragraph one) (statutes with contradictory provisions should be given a construction which will not nullify either); *Turley v. Turley*, 11 Ohio State 173, 179 (1860) ("presumption always is, that every word in a statute is designed to have *some* effect, and hence the rule [is] that, 'in putting a construction upon any statute, every part shall be regarded, and it shall be expounded, if practicable, as to give some effect to *every part of it*'"). Thus, I must favor an interpretation of R.C. 955.16 which affirms both the mandatory nature of the twenty-four hour exception clause of R.C. 955.16(C), signaled by the use of "shall," and the

² The mandatory meaning of "shall" in this context is further emphasized by the language of R.C. 955.16(B) which allows the sale of "[a]ny dog that is not redeemed...and that is not *required* to be donated...." (Emphasis added.)

discretionary nature of the authority to sell a dog to teaching or research facilities or to destroy the dog, signaled by the use of "may" in R.C. 955.16(B) and (C).

When R.C. 955.16 is read with this principle in mind, it becomes clear that the twenty-four hour exception clause of R.C. 955.16(C) is simply an additional holding period, like those required for a dog under R.C. 955.16(A), which comes into being only if the dog is offered to a research facility. R.C. 955.16(C) states that the dog shall not be destroyed "until twenty-four hours after it has been offered...*as provided in this section...*" (Emphasis added.) R.C. 955.16(B) provides that such sales are discretionary. Accordingly, if the dog warden or poundkeeper has exercised his or her discretion under R.C. 955.16(B) not to sell a dog to a requesting research facility, the requirement to hold the offer open for at least twenty-four hours never comes into being. Once the offer is made, however, the dog warden or poundkeeper must give the teaching or research facility at least twenty-four hours to respond, thus extending the time the dog must be held beyond the minimum required by R.C. 955.16(A) alone.

It is, therefore, my opinion and you are hereby advised that:

1. A dog warden or poundkeeper has discretionary authority, pursuant to R.C. 955.16(B) and (C), to destroy an impounded dog without first offering the dog for sale to a qualified teaching or research facility which has requested dogs.
2. If, pursuant to R.C. 955.16(B), a dog warden or poundkeeper offers an impounded dog to a requesting qualified teaching or research facility, the warden or poundkeeper is required by R.C. 955.16(C) to hold the dog for an additional twenty-four hours before the dog may be destroyed.