

OPINIONS  
OF THE  
**ATTORNEY GENERAL**

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OPINION NO. 78-001

**Syllabus:**

Jurisdiction over criminal violations of R.C. 3704.05 rests with the Court of Common Pleas, and may not be conferred upon an inferior court by local rule.

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To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio  
By: William J. Brown, Attorney General, January 5, 1978

I have before me your request for my opinion on the following question:

Where a violation of Revised Code 3704.05 occurs within the corporate limits of a municipality, and in a jurisdiction where the Court of Common Pleas by local rule transfers all offenses other than felonies to the appropriate Municipal Court, who is responsible for prosecuting such criminal actions?

Presently, all offenses other than felonies which are committed within the corporate limits of a municipality are prosecuted through that Municipal Law Department. All felonies which are committed within the County are prosecuted through the Office of the County Prosecutor in Common Pleas Court. It appears that a non-felony violation of 3704.05 ORC occurring within the corporate limits of a municipality would be without a forum.

R.C. 3704.05 prohibits violations of the air pollution regulations established by the Director of Environmental Protection. Criminal penalties for violation of R.C. 3704.05 are established in R.C. 3704.99, which provides, in pertinent part, as follows:

(A) Whoever violates division (A), (B), (C), (D), (E), (F), or (G) of section 3704.05 of the Revised Code shall be fined not more than ten thousand dollars . . .

(B) Whoever violates division (H) of section 3704.05 . . . shall be fined not more than twenty-five thousand dollars.

Significantly, there is no provision for incarceration for violation of R.C. 3704.05, but only fines as set forth above.

In a recent opinion I had occasion to consider R.C. 3704.05. 1977 Op. Att'y Gen. No. 77-016. I concluded in that opinion that:

. . . county prosecuting attorneys can initiate and prosecute criminal actions for violations of R.C. 3704.02, but are not empowered to bring civil actions to

enforce that section. City attorneys, city solicitors, and city law directors are not authorized to initiate or prosecute either criminal or civil actions for violations of R.C. 3704.05.

As discussed in the Opinion, this conclusion rested in part upon an unreported case from the Court of Appeals in Miami County, State v. Supinger, Case No. 75 CA 9 and 10, (App. 1975).

The Supinger case was a prosecution brought in municipal court for violation of R.C. 3704.05 (G). On appeal, the defendant argued that the municipal court lacked jurisdiction over the subject matter, since a violation of R.C. 3704.05 was not a misdemeanor. Under R.C. 1901.20 and R.C. 2931.041, the criminal jurisdiction of municipal courts is limited to violations of municipal ordinances and state misdemeanors. After consideration of R.C. 2901.02, the court concluded that the offense described in R.C. 3704.05 was neither a felony nor a misdemeanor, but an "unclassified offense." Therefore, the municipal court lacked jurisdiction to hear the action, and the conviction was reversed. Jurisdiction over a violation of R.C. 3704.05 thus belongs to the Court of Common Pleas as a court of general criminal jurisdiction. See R.C. 2931.03.

Under the local rule which you describe in your request, all "non-felony" offenses are transferred to the municipal court. However, under Supinger, *supra*, a municipal court lacks jurisdiction over such an offense. Thus, the issue presented is whether the common pleas court has the authority to confer jurisdiction upon the municipal court by local rule.

Under Ohio Const. art. IV, §1, the jurisdiction of the various courts is to be determined by the General Assembly. Monroeville v. Ward, 27 Ohio St.2d 197 (1971). While the various courts established by the General Assembly may establish local rules to govern their particular jurisdictions, no local rule will be effective if it is in conflict with a statute of general application. Grecian Gardens, Inc. v. Board of Liquor Control, 2 Ohio App.2d 112 (1964).

Since the jurisdiction of a municipal court is established by statute, any local rule in conflict with that statute would be ineffective. Grecian Garden, *supra*. In fact, the Supreme Court, in Humphrys v. Putnam, 172 Ohio St. 456, 460 (1961), made the following observation regarding the application of its own rules.

It is fundamental, however, that courts have only such jurisdiction as is conferred upon them by the Constitution or by the Legislature acting within its constitutional authority. Jurisdiction may not be assumed by a court by rule or by consent.

The issue in Humphrys was whether an order of the court of appeals was a "final order," but the basic premise for the court's decision was the language cited, *supra*.

Applying the rule in Humphrys to your question, it is apparent that the Court of Common Pleas may not relinquish its jurisdiction over R.C. 3704.05 criminal prosecutions by local rule. Only the General Assembly possesses the power to so act. Since jurisdiction over such prosecutions is limited to the Court of Common Pleas, the responsibility for prosecuting alleged violations of R.C. 3704.05 rests with the county prosecutor.

One further point deserves comment. The authority to prosecute for criminal violations of R.C. 3704.05 is specifically conferred upon the Attorney General by R.C. 3704.06. Such authority exists, however, only when the Director of Environmental Protection requests the Attorney General to prosecute. County Prosecutors appear to have broad discretion in this regard, since under R.C. 309.08 the County Prosecutor may prosecute any crime committed in his county and need not, therefore, await a request from the Director of Environmental Protection. See, 1977 Op. Att'y Gen. No. 77-016, p. 2-53.

Accordingly, it is my opinion, and you are so advised that:

Jurisdiction over criminal violations of R.C. 3704.05 rests with the Court of Common Pleas, and may not be conferred upon an inferior court by local rule.

### OPINION NO. 78-002

#### Syllabus:

Pursuant to R.C. 124.391, an appointing authority may neither promulgate a policy to provide cash payment for unused sick leave when an employee dies or resigns prior to retirement nor actually make such payment to the employee or his estate.

To: Lowell S. Petersen, Ottawa County Pros. Atty., Port Clinton, Ohio  
By: William J. Brown, Attorney General, January 6, 1978

I have before me your request for my opinion which states as follows:

Revised Code Section 124.391 provides for cash payments to be made to an employee for unused sick leave accumulated during service, at the time of retirement, in accordance with the policy in effect by the appointing authority. That Section makes no specific reference to what happens to unused sick leave if an employee dies or resigns his job before "retirement" time.

I respectfully request your opinion whether or not an appointing authority has power to promulgate a policy providing cash payment for unused sick leave on death of an employee or when an employee resigns prior to retirement.

I also request your opinion whether or not "at the time of their retirement" as used in Revised Code Section 124.391 encompasses the situation where an employee dies or resigns prior to retirement.

R.C. 124.391 states in pertinent part as follows:

All employees covered by R.C. 124.38 of the Revised Code but not eligible for benefits under section 124.39 of the Revised Code, and those covered by section 3319.141 of the Revised Code, shall at the time of their retirement receive pay for all or part of their unused sick leave to the extent consistent with the policy of the appointing authority in effect.

An appointing authority may include in its policy a requirement that an employee have a minimum number of years service with the unit in order to be eligible for a payment of unused sick leave. (Emphasis added.)

It is apparent that the retirement of an employee constitutes a condition precedent to the receipt of payment for unused, accumulated sick leave. R.C. 124.391 does not authorize an appointing authority to vary such condition by means

of promulgating a policy pursuant to that section. Therefore, the question to be answered is whether death or early resignation constitutes "retirement" for the purpose of R.C. 124.391.

In 1974 Op. Att'y Gen. No. 74-044, I had occasion to discuss the meaning of "retirement" as used in R.C. 124.39, which concerns the payment of unused accumulated sick leave for state employees. In that opinion, I stated that:

Retirement specifically denotes the termination of employment after a number of years of service according to a formal procedure. To construe the statute as authorizing the payment of accumulated sick leave credit upon the mere termination of employment, would permit an unjustifiably broad application of the statute.

The use of the term "retirement" in R.C. 124.39 is in pari materia with its use in R.C. 124.391. It cannot be said that death or early resignation constitute ". . . the termination of employment after a number of years of service according to a formal procedure." Accordingly, I am constrained to say that the phrase "at the time of their retirement" as used in R.C. 124.391 does not encompass a situation wherein an employee dies or resigns prior to his retirement.

Therefore, it is my opinion, and you are so advised that, pursuant to R.C. 124.391, an appointing authority may neither promulgate a policy to provide cash payment for unused sick leave when an employee dies or resigns prior to retirement nor actually make such payment to the employee or his estate.

#### OPINION NO. 78-003

**Syllabus:**

A county may budget funds for its Community Mental Health and Retardation Board, which are raised pursuant to an approved levy under R.C. 5705.22, in the ensuing fiscal year even though a portion of those funds will be accumulated in the ensuing fiscal year and spent subsequently, provided that such funds are accumulated for specific programs involving matching funds for that board.

**To: Edward J. Sustersic, Belmont County Pros. Atty., St. Clairsville, Ohio**  
**By: William J. Brown, Attorney General, January 9, 1978**

I have before me your request for my opinion regarding the Community Mental Health and Retardation Board in Belmont County. From information which you have supplied, it is my understanding that the Board would like to apply for "Operations Grants" from the National Institute of Mental Health. These grants would be in the form of matching funds over an eight-year period. Under the grant program, the exact breakdown of federal and local contributions is as follows:

<u>Year</u>	<u>Federal</u>	<u>Local</u>
1	80%	20%
2	65%	35%
3	50%	50%
4	35%	65%
5	30%	70%
6	20%	80%
7	20%	80%
8	20%	80%

While current levies for the boards in each of the counties making up your joint county district would easily cover the local share for the first three years of the program, in order to cover the local share during the remaining years an accumulation of levy monies in those first three years is required.

Therefore, you have asked whether it would be permissible for the Community Mental Health and Retardation Board (hereinafter "648" Board) to accumulate excess monies over the first three years of the grant in order to provide needed funds for the balance of the grant.

As you indicate, a similar question was addressed by one of my predecessors in 1966 Op. Att'y Gen. No. 66-144. That opinion reached the following conclusion:

A board of township trustees may not accumulate the proceeds of a voted levy for fire protection . . . during the life of the levy, for expenditure at a later date.

Support for that conclusion was taken from numerous sections of R.C. Chapter 5705., the tax levy laws. However, the gist of those sections relied upon is that the county budget commission is not authorized to approve any budget which includes an appropriation which is unnecessary in the ensuing fiscal year. A succinct statement of the levy law on this subject is found in the following excerpt from 1947 Op. Att'y Gen. No. 1915, p. 261, concerning R.C. 5705.34:

The budget law contemplates that the taxing authorities of the respective subdivisions shall not levy taxes for unnecessary purposes, and this policy is particularly disclosed in [R.C. 5705.34] which provides that when the budget commission has completed its work it shall certify its action to the taxing authority of each subdivision and taxing unit, together with the county auditor's estimate of the rate of tax 'necessary to be levied,' and that each taxing authority by ordinance or resolution shall authorize the 'necessary' tax levies, and certify them to the county auditor.

. . .

It, of course, is the intent of the budget law that no more and no less taxes be levied than necessary for the financial needs of the county and its subdivisions.

Applying this test to the situation under consideration in the 1966 opinion, that is the proposal of the township to accumulate funds in the ensuing fiscal year in order to purchase fire equipment in a subsequent year, my predecessor concluded that expenditure was speculative and unnecessary for the ensuing year. He thus concluded that the expenditure was unauthorized.

In order to determine whether the accumulation of levy funds proposed by your request for the 648 Board is "necessary," examination must be made of that Board's powers and duties. R.C. 340.03 provides, in pertinent part, as follows:

Subject to rules and regulations of the director of mental health and mental retardation, the community mental health and retardation board, with respect to its area of jurisdiction . . . shall:

(A) Review and evaluate community mental health and retardation services and facilities and submit to the director of mental health and mental retardation, the board or boards of county commissioners, and the executive director of the program, recommendations for reimbursement from state funds as authorized by section 5119.62 of the Revised Code and for the provision of needed additional services and facilities with special reference to the state comprehensive mental health plan;

(B) Coordinate the planning for community mental health and retardation facilities, services, and programs seeking state reimbursement;

(C) Receive, compile and transmit to the department of mental health and mental retardation applications for state reimbursement;

(D) Promote, arrange, and implement working agreements with social agencies, both public and private, and with educational and judicial agencies;

...  
(Emphasis added.)

From the foregoing it appears that one of the primary functions of the 648 Board is to arrange funding, both public and private. Therefore, expenses made to secure those funds are "necessary expenses" given the powers and duties of the 648 Board.

Where, as here, a county agency is empowered, in fact required, to seek out additional government funding for the conduct of its operations, then a budget which includes accumulation of monies in a current fiscal year in order to have sufficient monies for matching funds in subsequent fiscal years is a necessary expense in that current year. Unlike the situation described in 1966 Op. Att'y Gen. No. 66-144, the monies will be accumulated for a specific expense at a later date, with the ultimate sum needed readily discernible. Moreover, the net effect is to increase the funds available to the 648 Board without the necessity of an increase in county taxes. Finally, in a situation where matching funds are involved, the appropriation for an accumulation in the current fiscal year is in fact necessary to receive the federal funds in that year under the program. Therefore, the accumulation is, in a practical sense, a necessary expense in that year.

Accordingly, it is my opinion, and you are so advised that:

A county may budget funds for its Community Mental Health and Retardation Board, which are raised pursuant to an approved levy under R.C. 5705.22, in the ensuing fiscal year even though a portion of those funds will be accumulated in the ensuing fiscal year and spent subsequently, provided that such funds are accumulated for specific program involving matching funds for that board.

#### OPINION NO. 78-004

#### Syllabus:

Imprisonment of indigents is a prerequisite to the payment of criminal costs by the Ohio Public Defender Commission pursuant to R.C. 2949.12, et seq. and Am. Sub. H.B. No. 191.

To: **J. Tullis Rogers, Ohio Public Defender Commission, Columbus, Ohio**  
By: **William J. Brown, Attorney General, January 31, 1978**

Your request for my opinion poses the question of whether imprisonment of convicted indigents is a prerequisite to payment of criminal costs by the state.

R.C. 2949.14 through 2949.19 concern the payment of costs incurred in criminal cases. R.C. 2949.14 requires the clerk of a court of common pleas to prepare a bill of costs of prosecution upon the sentence of a person following conviction for a felony. In the event the costs of prosecution are not paid, the

clerk, pursuant to R.C. 2949.15, must cause the sheriff to levy upon the property of the accused to collect such costs. If the sheriff has been unable to levy upon property of the convict, R.C. 2949.16 requires him to deliver a certified cost bill, upon which costs already paid are credited, to the person in charge of the penal institution where the convict is found.

R.C. 2949.18 provides in pertinent part as follows:

When the clerk of the court of common pleas certifies on a cost bill that execution was issued under 2949.15 of the Revised Code, and returned by the sheriff "no good, chattels, lands, or tenements found whereupon to levy", the person in charge of the penal institution to which the convicted felon was sentenced shall certify thereon the date on which the prisoner was received at the institution and the fees for transportation, whereupon the auditor of state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of state for such amounts as he finds to be correct. (Emphasis added)

R.C. 2949.19 mandates that:

Upon the return of the writ against a convict issued under section 2949.15 of the Revised Code, if an amount of money has not been made sufficient for the payment of costs of conviction and no additional property is found whereon to levy, the clerk of the court of common pleas shall so certify to the auditor of state, under the seal of the court, with a statement of the total amount of costs, the amount paid, and the amount remaining unpaid . . . Such unpaid amount as the auditor of state finds to be correct shall be paid by the state to the order of such clerk.

The above sections were altered by Am. Sub. H.B. 191 (eff. 6-30-77) which, in setting forth the appropriation for the Ohio Public Defender Commission for the current biennium, provided in §1 that:

Notwithstanding any provisions of law to the contrary, the Public Defender Commission shall assume the responsibilities of the Auditor of State with respect to the administration and distribution of the criminal costs subsidy, which has previously been appropriated to the Auditor of State. This provision shall not affect the continuing responsibility of the Auditor of State to exercise the audit function.

The effect of this provision is simply to substitute the Ohio Public Defender Commission for the Auditor of State as the issuer of the warrant for funds to reimburse the county for costs incurred in the prosecution of the convict.

In 1942 Op. Att'y Gen. No. 4702 one of my predecessors expressed the opinion that, while a sentence for a felony to imprisonment is condition precedent to the State's liability for costs under the above sections, the timing of such sentence was immaterial. Specifically, that opinion addressed a situation wherein a person was convicted and placed upon probation by the court. Later, he was found to have violated the terms of his probation and sentenced to prison. In such a situation, the State was found to be liable for costs of the prosecution, irrespective of the intervening period of probation. That opinion appeared to recognize, by implication, that the State is not liable for costs until the convicted felon is sentenced to a term of imprisonment.

This implication leads to the correct result. R.C. 2949.18 requires that the person in charge of a penal institution certify upon the cost bill prepared by the clerk of the court of common pleas the date that the convicted felon was received as a condition precedent to payment of costs by the state. From this language, it is apparent that imprisonment is required prior to state payment of criminal costs.

In passing, it should be noted that reimbursement for the expense of appointed counsel by the Ohio Public Defender Commission is not contingent upon imprisonment of an indigent defendant. Prior to the enactment of Am. Sub. H.B. No. 164 (effective January 13, 1976), R.C. 2949.19 and 2941.51 provided for state payment of the costs of court-appointed counsel. At that time, R.C. 2941.51 stated that such expenses were to be taxed as part of costs. R.C. 2949.19 provided the part of the costs remaining unpaid after execution against the property of one convicted and sentenced to the penitentiary were to be certified to the Auditor of State for payment. Am. Sub. H.B. No. 164 removed the counsel expense from those sections and mandated that the commission provide reimbursement for such expense regardless of the outcome of the trial.

Therefore, it is my opinion, and you are so advised, that:

Imprisonment of indigents is a prerequisite to the payment of criminal costs by the Ohio Public Defender Commission pursuant to R.C. 2949.12, et seq. and Am. Sub. H.B. No. 191.

#### OPINION NO. 78-005

##### Syllabus:

1. State liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.
2. Pursuant to R.C. 4301.16, the Department of Liquor Control may write-off unintentional merchandise shortages to the extent that the amount credited to each store annually does not exceed one-fortieth of one percent of each store's yearly gross sales. There is no statutory authority for the department to write-off intentional merchandise shortages or cash shortages of any kind.

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To: Clifford E. Reich, Dept. of Liquor Control, Columbus, Ohio  
By: William J. Brown, Attorney General, February 7, 1978

I have before me your request for my opinion regarding the following two questions:

- 1.) Which, if any, of the state liquor store cash and merchandise shortages, shown by audits for periods of less than one year, should legally be submitted to the

Auditor as claims pursuant to Section 115.10 of the Ohio Revised Code?

2.) How and when is it legally proper for the department to write off cash and merchandise shortages for state liquor stores?

You indicate in your letter that these questions have arisen because R.C. 4301.16 allows a credit for merchandise shortages to each state liquor store of one-fortieth of one percent of the store's yearly gross sales and because of the appellate court decisions in Weiner v. Crouch, 120 Ohio App. 49 (1963) and In the Matter of Drain, 28 Ohio App. 2d 102 (1970), which held that a state liquor store manager may not be held liable for shortages unless negligence is proven.

Initially you inquire if liquor store shortages determined by means of an interim departmental audit can be considered a claim due and payable the state for the purposes of R.C. 115.10. R.C. 115.10, which requires that state officers and agents report claims in favor of the State to the Auditor of State, provides as follows:

When an officer or agent of the state comes into possession of a claim due and payable to the state, he shall demand payment thereof, and on payment shall have the amount certified into the state treasury. If he fails to collect such claim within thirty days after it comes into his possession, he shall certify it to the auditor of state, specifying the transaction out of which it arose, the amount due, the date of maturity, and the time when payment was demanded. The auditor of state shall not issue his warrant on the treasurer of state for the salary of any such officer or agent of the state until this section is complied with.

The term, a claim due and payable the state, is not expressly defined for the purposes of R.C. 115.10. A "claim" in its ordinary sense, however, "imports the assertion, demand, or challenge, of something as a right, or it means the thing thus demanded or challenged." Fordyce v. Godman, 20 Ohio St. 1, 4 (1870). Thus, the statute presupposes the existence of an identifiable claim of a certain amount arising out of a specific transaction. The requirements of the statute, however, also presuppose the existence of an identifiable party against whom the claim can be asserted. In other words, before a claim due and payable the state can arise there must be an identifiable party responsible for payment. In order to determine if this last requirement is met with respect to liquor store shortages, it is necessary to consider the duties and liabilities of the various parties responsible for the management of the stores.

R.C. 4301.12 provides that "[t]he department of liquor control shall by regulation provide for the custody, safekeeping and deposit of all moneys received by it or any of its employees or agents . . ." In order to protect public funds within the control of the department, R.C. 4301.08, which requires the department's officers and employees to be bonded, provides in part as follows:

Each member of the liquor control commission shall give bond to the state in the amount of ten thousand dollars, and the director of liquor control shall give bond to the state in the amount of one hundred thousand dollars . . . The director may require any employee of the department of liquor control to give like bond in such amount as the commission prescribes . . . The premium on any bond required or authorized by this section may be paid from the moneys received for the use of the department under Chapters 4301. and 4303. of the Revised Code or from appropriations made by the General Assembly.

Prior to the appellate court decisions in Weiner v. Crouch, 120 Ohio App. 49 (1963) and In Re Matter of Drain, 28 Ohio App. 2d 102 (1970), the Department of Liquor Control's right to assert claims for store shortages was based on Department of Liquor Control, Regulation IV, B5, which provided that a store manager was personally liable for all monies received by the store. On the basis of this regulation, the Director of Liquor Control required all stores managers to pay to the State an amount equal to any shortages found by an auditor less the statutory allowance for breakage. Thus, under this regulation, any shortage could immediately result in an identifiable, assertable claim against a known party responsible for payment. The Franklin County Court of Appeals in Weiner, supra, and the Montgomery County Court of Appeals in Drain, supra, have held, however, that a manager of a state liquor store is not a public officer and is not, therefore, responsible for cash or merchandise shortages without proof of complicity or guilt. In view of these appellate court decisions, it is my opinion that a cash or merchandise shortage shown by means of a bi-monthly departmental audit does not automatically give rise to a claim due and payable the state subject to the provisions of R.C. 115.10, since, without further investigation and an adjudication of the liability of the various parties responsible for the care and custody of liquor store funds and property, the department cannot assert a claim for the recovery of the shortage as a matter of right.

Although R.C. 115.10 is very broad and general, it is not the only procedure for asserting and collecting money due the State. The Department of Liquor Control itself has, pursuant to R.C. 4301.10, the power to investigate store shortages and to bring suit to recover such losses shown by means of an interim audit. R.C. Chapter 117 also provides for the assertion of claims arising from the loss of or failure to account for public funds.

R.C. 117.01, which establishes the Bureau of Inspection and Supervision of Public Offices, provides that the bureau shall inspect and supervise the accounts and reports of all state offices. The test of what constitutes a state office for the purpose of R.C. Chapter 117 is merely that the agency or organization be clothed with some part of the sovereignty of the state. 1954 Op. Atty Gen. No. 4224, p. 460. Moreover, R.C. 117.09, which regulates the time of examinations, expressly provides that the bureau shall examine each public office, department or agency. Since the Department of Liquor Control is enumerated in R.C. 121.02 as one of the departments of state administration, there can be no doubt that it is subject to examination pursuant to R.C. Chapter 117.

R.C. 117.10, which describes the actions to be taken as a result of an examination by the bureau, provides in relevant part as follows:

The report of the examination made by the bureau of inspection and supervision of public offices shall set forth, in such detail as is deemed proper by the bureau, the result of the examination with respect to every matter inquired into. . . .

If the report relates to the expenditure of public money from the state treasury or to the disposition of property belonging to the state, a certified copy shall be filed with the attorney general. . . .

If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report, . . . shall within ninety days after the receipt of the certified copy of such report, institute civil actions in the proper court in the name of the political subdivision or taxing district to which the public money is due or the public property belongs for the recovery of

the money or property and shall prosecute such actions to final determination.

. . . .

"Public money" as used in this section includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor. (Emphasis added.)

Since R.C. 117.10 is expressly made applicable to situations wherein any public money collected has not been accounted for and public property has been converted or misappropriated, it is clearly applicable to liquor store shortages of either cash or merchandise. Moreover, since R.C. 117.10 authorizes the initiation of a civil action, it is particularly well-suited to those situations wherein the recovery for cash or merchandise shortages may require proof of complicity or fault on the part of the store manager or other employee or party.

Thus, it is my opinion that state liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.

Your second question concerns the department's authority to write-off cash and merchandise shortages. With respect to merchandise shortages, R.C. 4301.16 expressly provides that

[U]pon proof of accidental breakage or unintentional shortage of stock, which proof shall be subject to the final approval of the department of liquor control, the department shall allow yearly credits to each state liquor store not to exceed one-fortieth of one percent of each state liquor store's yearly gross sales, for the moneys required by this section to be paid by such state liquor store to the department of liquor control. (Emphasis added.)

Thus, the department's authority to write-off merchandise shortages is limited to situations where there is proof of accidental breakage or unintentional shortage and where the amount of the shortage in a store does not exceed one-fortieth of one percent of that store's yearly gross sales.

With respect to cash shortages, R.C. 4301.16 provides that all monies received from the sale of liquor at state liquor stores shall be paid to the department of liquor control and shall be accounted for and paid over by the department to the treasurer of state as custodian. Thus, there is no statutory authority for the department to write-off a cash shortage.

Thus, it is my opinion and you are so advised that:

1. State liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of R.C. 115.10. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to R.C. 117.10.
2. Pursuant to R.C. 4301.16, the Department of Liquor Control may write-off unintentional merchandise shortages to the extent that the amount credited to each store annually does not exceed one-fortieth of one percent of each store's yearly gross sales. There is no statutory authority for the department to write-off intentional merchandise shortages or cash shortages of any kind.

## OPINION NO. 78-006

## Syllabus:

1. A "tract of land" as used in R.C. 1509.27 includes a portion of a "tract", as defined in R.C. 1509.01 (J).
2. A "tract" for the purpose of R.C. 1509.29 includes a portion of a "tract" as defined in R.C. 1509.01 (J).

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To: Robert W. Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio  
By: William J. Brown, Attorney General, February 13, 1978

Your request for my opinion poses the following questions:

1. For the purpose of establishing a drilling unit under Ohio Revised Code §1509.27, (mandatory pooling orders), may the "tract" which is insufficient for a drilling unit (that mentioned in the first paragraph of Ohio R.C. §1509.27) and which requires the addition of other land through a pooling order be a portion of a "tract?"
2. May an owner of such a portion apply for designation of that portion as an exception tract under R.C. 1509.29?

You state in your letter that the failure to allow pooling of neighboring tracts with a portion of a tract would have the effect of allowing oil and gas resources under that portion which are not tapped by other drilling units in the tract to go unused. While such a result certainly would be undesirable, the authority to promulgate mandatory pooling orders must be derived from statute. Accordingly, it is necessary to examine the scheme of oil and gas regulation established by R.C. Chapter 1509.

R.C. Chapter 1509 is the first attempt to comprehensively regulate the production of oil and gas in Ohio. The goal sought by the General Assembly, when the legislation was enacted in 1965, was to seek a balance between private rights and the public interest. Specifically, the primary thrust of R.C. Chapter 1509 is to prevent both physical and economic waste of Ohio's oil and gas resources, through devices such as mandatory pooling and statewide well spacing. Meyers and Williams, Petroleum Conservation in Ohio, 26 Ohio St. L.J. 591 (1965).

R.C. 1509.27 concerns mandatory pooling orders, providing in pertinent part that:

If a tract of land is of insufficient size or shape to meet the requirements for drilling a well thereon as provided in section 1509.24 or 1509.25 of the Revised Code, whichever is applicable and the owner has been unable to form a drilling unit under agreement provided in section 1509.26 of the Revised Code, on a just and equitable basis, the owner of the tract may make application to the division of oil and gas for a mandatory pooling order.

"Tract" is defined in R.C. 1509.01 (J) as ". . . a single, individually taxed parcel of land appearing on the tax list." It is my understanding that your request contemplates a situation wherein a tract of land as defined above is of sufficient size to allow several drilling units to be formed within it plus a portion of a tract insufficient to constitute a drilling unit.

The Oil and Gas Board of Review is established by R.C. 1509.35. Persons aggrieved by an order of the Chief of the Division of Oil and Gas may, pursuant to R.C. 1509.36, appeal to the Board. The Board must conduct a hearing. If it finds the order lawful and reasonable, it must affirm it. If it does not, it may either vacate the order or make the order it finds the chief should have made. R.C. 1509.36. Pursuant to this authority, the Board, in Jerry Moore, Inc., Appeal No. 1, Ohio Oil and Gas Board of Review (July 1, 1966), determined that:

. . . an examination of said sections [R.C. Chapter 1509] discloses that the word "tract" is used therein at least thirty-nine times and that in several instances where used a narrow construction of the language "a single, individually taxed parcel of land appearing on the tax list" would be entirely unworkable.

In Moore, the appellant, who wished to have a mandatory pooling order issued regarding an eight acre portion of a one hundred seventy-four acre tract, was denied such an order. The appellee contended that the eight acres was not a tract. While the Board affirmed the order of appellee on other grounds, it held that the portion was a "tract" as defined in R.C. 1509.01 (J). The Board based its decision not only on the above construction but also upon the intent of the legislature to encourage the development of oil and gas in Ohio.

The meaning of the word "tract" as used in R.C. 1509.27 was also carefully analyzed by Meyers and Williams in the context of an issue regarding the continued validity of a portion of a lease which is not in a unit. They persuasively argue that "tract" as used in R.C. 1509.27 refers in that case to the portion of a lease which is included in a drilling unit which is established by a pooling order issued pursuant to that section. Meyers and Williams, supra, at 625-627.

R.C. Chapter 1509 is a highly technical amalgam of provisions for the regulation of oil and gas production. The Oil and Gas Board of Review is charged with the duty of insuring that orders of the Chief of Division of Oil and Gas comply with this Chapter. Great deference must, of course, be accorded administrative interpretations of statutory provisions. Jones Metal Products Co. v. Walker, 29 Ohio St.2d 173, 181 (1972); State, ex rel. Johnson & Higgins Co. v. Safford, II, Ohio St. 376, 382 (1927); State, ex rel. Crabbe v. Middletown Hydraulic Co., 114 Ohio St. 437, 452-457 (1926); 1974 Op. Atty Gen. No. 74-064. This is especially true where the interpretation of the administrative body is consistent with the purpose of the statute it is interpreting. Accordingly, it is my opinion that a "tract of land" as used in R.C. 1509.27 includes a portion of a "tract", as defined in R.C. 1509.01 (J).

Your second question concerns the term "tract" as it relates to R.C. 1509.29, which provides:

Upon application by an owner of a tract for which a drilling permit may not be issued, and a showing by him that he is unable to enter a voluntary pooling agreement and that he would be unable to participate under a mandatory pooling order, the chief of the division of oil and gas shall issue a permit and order establishing the tract as an exception tract if the chief finds that such owner would otherwise be precluded from producing oil or gas from his tract because of minimum acreage or distance requirements. The order shall set a percentage of the maximum daily potential production at which the well may be produced. The

percentage shall be the same as the percentage that the number of acres in the tract bears to the number of acres in the minimum acreage requirement which has been established under section 1409.24 or 1509.25 of the Revised Code, whichever is applicable, but if the well drilled on such tract is located nearer to the boundary of the tract than the required minimum distance, the percentage may not exceed the percentage determined by dividing the distance from the well to the boundary by the minimum distance requirement. Within ten days after completion of the well, the maximum daily potential production of the well shall be determined by such drill stem, open flow, or other tests as may be required by the chief. The chief shall require such tests, at least once every three months, as are necessary to determine the maximum daily potential production at that time.

The word "tract" was interpreted by the Oil and Gas Board in Moore, supra, in the same fashion as used in R.C. 5907.27, to include portions of single, individually taxed parcels of land appearing on the tax list. In Evelyn H. Lyons, Appeal No. 4, Ohio Oil and Gas Board of Review (March 14, 1967), the Board noted that R.C. 1509.29 was designed to enable owners of tracts of insufficient size for drilling units to recover the oil and gas underneath such tracts. The Board found that the General Assembly had intended that ". . . no person should be precluded from producing oil and gas from his property because of minimum acreage or distance requirements . . ." where the conditions of R.C. 1509.29 are satisfied. Accordingly, it is my opinion that a "tract" for the purpose of R.C. 1509.29 includes a portion of a "tract" as defined in R.C. 1509.01 (J). See Emens & Lowe Ohio Oil & Gas Conservation Law - The First Ten Years, 37 Ohio St. L.J. 31 (1976).

Therefore, it is my opinion, and ye: are so advised, that:

1. A "tract of land" as used in R.C. 1509.27 includes a portion of a "tract", as defined in R.C. 1509.01 (J).
2. A "tract" for the purpose of R.C. 1509.29 includes a portion of a "tract" as defined in R.C. 1509.01 (J).

#### OPINION NO. 78-007

##### Syllabus

1. The Ohio Building Authority may, pursuant to R.C. 152.08 (A) (13) and 152.21 (A), sell two floors of office space in the new Cleveland State Office Building to the Cleveland Regional Transit Authority.
2. The Ohio Building Authority may, pursuant to R.C. 152.08 (A) (13) and 152.24 (B), lease office space in the Cleveland State Office Building to the Regional Transit Authority.
3. The Ohio Building Authority may lease office space in the Cleveland State Office Building with the

Regional Transit Authority and grant said lessee an option to purchase such space.

4. The Ohio Building Authority must lease sufficient office space in the Cleveland State Office Building to the Department of Administrative Services for the use of state agencies. The Ohio Building Authority need not lease space not immediately necessary for state use to the Department of Administrative Services.

To: Daniel F. Shields, Executive Director, Ohio Building Authority, Columbus, Ohio  
 By: William J. Brown, Attorney General, February 23, 1978

I have before me your request for my opinion in which the following questions are asked:

1. Can the Ohio Building Authority (OBA) sell two floors of office space in the new State Office Building to the Cleveland Regional Transit Authority, a political subdivision of the State of Ohio?
2. Can the OBA lease office space in the Cleveland State Office Building to the Regional Transit Authority?
3. Can the OBA lease office space in the Cleveland State Office Building and also grant an option to purchase such space to the Cleveland Regional Transit Authority?
4. Must the OBA lease the entire amount of space in the Cleveland State Office Building to the Ohio Department of Administrative Services?

R.C. Chapter 152 generally provides for the establishment of the Ohio Building Authority (OBA). R.C. 152.08 (A) (13) states that the OBA may:

Sell, lease, release or otherwise dispose of property owned by the authority and not needed for the purpose of the authority and grant such easements across the property of the authority as will not interfere with its use of the property.

In addition, with regard to office buildings, the OBA is empowered by R.C. 152.21 (A) to ". . . dispose of real estate and interests in real estate . . ." It is my understanding that the OBA has determined that the two floors in question are not needed for the purpose of the authority. It is necessary therefore to determine whether the two floors of a state office building are "property" as contemplated by R.C. 152.08 (A) (13). Ohio law recognizes that parts or units of a building may be considered real property. See, e.g., R.C. Chapter 531 (concerning condominium property). Even without statutory authorization, there is a common law basis for the proposition that a conveyable real property interest is contained therein. 1971 Op. Atty Gen. No. 71-031. Accordingly, a portion of a state office building is "property" for the purpose of R.C. 152.08 (A) (13).

The OBA's authority to dispose of property is not, however, absolute. This authority must be exercised in accordance with applicable constitutional

limitations. Ohio Const. art. VIII, §4, which prohibits the state from lending its credit to an individual, (and Article VIII, §6, concerning cities and counties, with which it is in pari materia) has been judicially interpreted to prevent the state from owning part of a property which is owned in part by a private individual or corporation where the parts are inextricably mixed and thus physically inseparable. See, State ex rel. Wilson v. Hance, 169 Ohio St. 457 (1959); Village of Brewster v. Shell, 128 Ohio St. 343 (1934); Alter v. City of Cincinnati, 56 Ohio St. 47 (1897); 1977 Op. Atty Gen. No. 77-047. This constitutional provision, therefore, limits the power of the OBA to divest itself of portions of a single property to the extent that such transaction constitutes the loaning of credit to or in aid of a private business enterprise or individual.

While it is important to note this constitutional constraint, it is not necessary for the purposes of this opinion to discuss in full its import. A regional transit authority is, pursuant to R.C. 307.31, a political subdivision of the state. Ohio Const. art. VIII, §4 does not prohibit the state from lending its credit to a public organization created for a public purpose. Bazell v. Cincinnati, 13 Ohio St.2d 63 (1968); State ex rel. Kaur v. Defenbacher, 153 Ohio St. 550 (1950).

It is, therefore, my opinion that the OBA may, pursuant to R.C. 152.08 (A) (13) and R.C. 152.21 (A), sell two floors of office space in the new state office building to the Cleveland Regional Transit Authority.

Your second inquiry poses the question of whether the OBA may lease the above-mentioned office space to the Cleveland Regional Transit Authority. As previously discussed, R.C. 152.08 (A) (13) provides the OBA with authority to, inter alia, lease property owned by it which is not needed for the purpose of the authority. However, with respect to office buildings owned by the OBA, this power is limited by R.C. 152.24 (B), which provides as follows:

(B) If the space is not immediately necessary for state use, the authority may lease excess space in any building or facility acquired or constructed by the authority for the use of state agencies to any local or federal agency.

Therefore, the OBA is authorized to lease such office space to governmental agencies only when the space is not immediately necessary for state use. In R.C. 152.24 (A), the director of the Department of Administrative Services is required to lease ". . . any building or facility acquired or constructed by the Ohio Building Authority for the use of any state agencies . . ." Accordingly, the director is responsible for determining whether the space is immediately necessary for state use. It is my understanding that the director of DAS has determined that the office space in question is not immediately necessary for state use. Thus, the first requirement of R.C. 152.24 is fulfilled.

The second requirement, that the lease be entered into with either a local or federal governmental agency, raises the question of whether the Regional Transit Authority is such an agency. The Authority was established pursuant to R.C. 306.31, which provides in pertinent part as follows:

A regional transit authority may be created in the manner provided in section 306.32 of the Revised Code, for any one or more of the following purposes: . . . A regional transit authority so created is a political subdivision of the state, and a body corporate with all the powers of a corporation . . . (Emphasis added.)

Since the term governmental agency, is not expressly defined for the purposes of R.C. Chapter 142, it must be construed according to common usage. R.C. 1.42. For the purposes of this opinion, it is sufficient to note that political subdivisions are generally held to be governmental agencies. Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969) (county is a governmental agency); City of Bowling Green v. Board of Education, 443 S.W.2d 243 (Ky. 1969) (school district is a governmental

agency); Town of Falls Church v. Arlington County Board, 166 Va. 192, 184 S.E. 459 (1936) (municipal corporation is a governmental agency.) Therefore, it is my opinion that the OBA may, pursuant to R.C. 152.08 (A) (13) and 152.24 (B), lease office space in the Cleveland State Office Building to the Regional Transit Authority.

In answer to your third question, because the OBA has the authority to sell office space to the Regional Transit Authority as well as to lease it, it would necessarily have the authority to lease such space and grant the lessee an option to purchase.

Your last question relates to whether the OBA is required to lease the entire amount of office space in the Cleveland State Office Building to the DAS. As previously discussed, R.C. 152.24 (A) requires DAS to ". . . lease any building . . . constructed by the Ohio Building Authority for the use of any state agencies . . ." This provision does not, however, require that DAS lease office space not immediately necessary for state use. Rather, R.C. 152.24 (B) permits the OBA to directly lease such space to ". . . any local or federal agency." Accordingly, it is my opinion that the OBA must lease sufficient office space in the Cleveland State Office Building to DAS for the use of state agencies. It need not lease space not immediately necessary for state use, as determined by the director of DAS, to that department.

Therefore, it is my opinion, and you are so advised, that:

1. The Ohio Building Authority may, pursuant to R.C. 152.08 (A) (13) and 152.21 (A), sell two floors of office space in the new Cleveland State Office Building to the Cleveland Regional Transit Authority.
2. The Ohio Building Authority may, pursuant to R.C. 152.08 (A) (13) and 152.24 (B), lease office space in the Cleveland State Office Building to the Regional Transit Authority.
3. The Ohio Building Authority may lease office space in the Cleveland State Office Building with the Regional Transit Authority and grant said lessee an option to purchase such space.
4. The Ohio Building Authority must lease sufficient office space in the Cleveland State Office Building to the Department of Administrative Services for the use of state agencies. The Ohio Building Authority need not lease space not immediately necessary for state use to the Department of Administrative Services.

#### OPINION NO. 78-008

#### Syllabus:

1. A certified county board of building standards has no authority to adopt a regulation granting a variance below the minimum standards prescribed in the Ohio Building Code.
2. When a certified county board of building standards acts on behalf of a member municipality, its

authority is limited to that granted by statute and Article XVIII, §3, Ohio Constitution to such municipality.

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To: Frank W. King, Chairman, Board of Building Standards, Columbus, Ohio  
By: William J. Brown, Attorney General, March 3, 1978

I have before me your request for my opinion on several matters concerning the authority of county building departments, certified by the Ohio Board of Building Standards, in their adoption of rules and regulations that conflict with those of the Ohio Building Code (OBC). Your questions may be summarized as follows:

1. Does a county board of building standards, which is certified by the Ohio Board of Building Standards, have the authority to grant any variance or make any judgment below the minimum standards prescribed in the Ohio Building Code?
2. When a county board of building standards acts on behalf of a member municipality, is its authority limited to that granted to a municipality under R.C. 3781.01?

R.C. 3781.07 establishes the Ohio Board of Building Standards in the Department of Industrial Relations. The duties of the Board are set forth in R.C. 3781.07(A) as follows:

The [Ohio] board of building standards shall:

(A) Formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, including land area incidental thereto, the construction of industrialized units, the installation of equipment, and the standards or requirements for materials to be used in connection therewith . . . Such rules shall be the lawful minimum requirements specified for such buildings or industrialized units . . . (Emphasis added)

These rules comprise the Ohio Building Code, part of the Ohio Administrative Code.

R.C. 307.37 authorizes a board of county commissioners to adopt regulations concerning single, two and three family dwellings within the county's unincorporated area. This provision also authorizes such a board to create a building regulation department for the purpose of enforcing such regulations. Similarly, R.C. 3781.01 permits the legislative authority of a municipal corporation to make " . . . further regulations, not in conflict with such chapters or with the rules and regulations of the [Ohio] board of building standards." R.C. 3781.10(E) directs the Ohio Board of Building Standards to certify municipal and county building departments in order that they might exercise enforcement authority and make inspections pursuant to the enforcement provisions of R.C. 3781.03 and 3791.04.

In certain situations, a county board of building standards, certified pursuant to R.C. 3781.03(E), has within it member municipalities which have the power to make "further and additional" regulations under R.C. 3781.01. Your request describes such a situation, where the county board, representing both the county

and municipalities within it, has approved a variance permitting a lesser standard for installation than that mandated by the Ohio Building Code. It is my understanding that this variance covers both the county and municipalities within it.

R.C. 3781.10(A) states that the rules adopted by the Ohio Board of Building Standards shall be the lawful minimum requirement. R.C. 3781.102(B) requires that rules established by a county board of commissioners for the licensing of certain contractors not conflict with the Ohio Building Code. No other provision in the Revised Code permits a board of county commissioners to adopt building standards below those set forth in the Ohio Building Code. Similarly, R.C. 3781.01 limits building standards set by municipalities to those consistent with the Ohio Building Code. Therefore, it is my opinion that a certified county board has no authority to adopt a regulation granting a variance below the minimum standards prescribed in the Ohio Building Code.

Your second question concerns the scope of authority of a certified county board when it acts on behalf of a member municipality. Chartered municipalities may regulate buildings pursuant to Article XVIII, §3, Ohio Constitution, which provides that:

Municipalities shall have the authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Such regulation constitutes an exercise of the police power and hence may not conflict with general laws of the state. Wilson v. Cincinnati, 46 Ohio St.2d 138 (1976).

R.C. 715.26 empowers municipalities to:

- (A) Regulate the erection of buildings or other structures and the sanitary condition thereof, the repair of, alteration in, and additions to buildings and other structures;
- (B) Provide for the inspection of buildings or other structures, and for the removal and repair of unsecure, unsafe, or structurally defective buildings or other structures . . .

That these specifically enumerated powers do not preclude the exercise of a municipality's police power in this area is evidenced by R.C. 715.30, which provides municipal corporations with the authority to seek injunctions ". . . to prevent violations of ordinances and regulations enacted pursuant to sections 715.26 to 715.29, inclusive of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution . . ." (emphasis added). The use of the word "or" indicates that the General Assembly did not intend to restrict the police powers of a municipality by granting the powers enumerated in R.C. 715.26.

The General Assembly did, however, restrict a municipality's police power to regulate buildings by enacting R.C. 3781.01, which as discussed earlier, permits a municipal corporation to promulgate regulations regarding building standards not in conflict with standards set by the Ohio Board of Building Standards. Therefore, a charter municipality possesses authority pursuant to Article XVIII, §3, Ohio Constitution, and R.C. 715.26 to 715.29 to promulgate and enforce building regulations, limited only by the provisions of R.C. 3781.01.

R.C. 307.38, which provides for the appointment of a county building inspector, also permits a board of county commissioners to:

. . . contract with any municipal corporation in the county for the administration and enforcement of said building regulations and any municipal corporation may contract with the board for the administration and enforcement of the building regulations of such municipal corporation.

When a county board of building standards enforces municipal regulations under such an agreement, it necessarily possesses the authority granted to such municipality to enforce those regulations. There is, however, no authority for a county board to act beyond the enforcement powers granted to a municipality upon whose behalf it is acting. Therefore, it is my opinion that when a county board of building standards acts on behalf of a member municipality, its authority is limited to that granted by statute and Article XVIII, §3, Ohio Constitution to such municipality.

In specific answer to your question, it is my opinion, and you are so advised, that:

1. A certified county board of building standards has no authority to adopt a regulation granting a variance below the minimum standards prescribed in the Ohio Building Code.
2. When a certified county board of building standards acts on behalf of a member municipality, its authority is limited to that granted by statute and Article XVIII, §3, Ohio Constitution to such municipality.

#### OPINION NO. 78-009

#### Syllabus:

A health district created pursuant to R.C. 3709.01 is not subject to the imposition of the tax imposed by R.C. 3905.36 on an association, company or corporation that purchases insurance from an insurer not authorized to do business in this state.

**To: Joseph R. Grunda, Lorain County Pros. Atty., Elyria, Ohio**  
**By: William J. Brown, Attorney General, March 15, 1978**

I have before me your request for my opinion as to whether a health district is required, pursuant to R.C. 3905.36, to pay a five percent tax on an insurance premium due to the fact that the insurance was purchased from a company not authorized to do business in the State of Ohio.

R.C. 3905.36, which imposes a tax on firms dealing with unauthorized foreign insurers, provides in part as follows:

Every insured association, company, or corporation who enters directly or indirectly into any agreements with any insurance company, association, individual, firm, underwriter, or Lloyd, not authorized to do business in this state . . . shall . . . pay to the superintendent [of insurance] a tax of five percent of such premium, for

assessment, or other consideration. All taxes collected under this section by the superintendent shall be paid by him, upon the warrant of the auditor of state, into the general fund of the state . . .

R.C. 3905.36 expressly exempts certain insurers and certain transactions from the imposition of the tax. R.C. 3905.36 (A) through (D). You indicate in your letter, however, that the Department of Insurance has determined that the health district does not qualify for any of these exemptions and you do not challenge this determination. I shall, therefore, accept the department's determination without further consideration of the exemptions.

The applicability of the statute is, however, further restricted in that the tax must be imposed only on an association, company or corporation that purchases insurance from an insurer not authorized to do business in this state. Since the terms association, company and corporation are not defined for the purposes of R.C. 3905.36, I am directed by R.C. 1.43 to construe them according to their common usage.

The term corporation is commonly used to mean a body of individuals united as a single separate entity, chartered by statute, with the power to maintain perpetual succession and to do corporate acts. Dartmouth College v. Woodward, 17 U.S. 518 (1819). Studebaker Corp. v. Allied Products, 256 F. Supp. 173 (D.C. Mich., 1966). An association is a body of persons organized without a charter but having the general form and mode of procedure of a corporation. In re Midwest Athletic Co., 161 F.2d 1005, 1008 (1947). Company is an association of a number of individuals for the purpose of carrying on a legitimate business. Bradley Fertilizer Co. v. South Pub. Co., 23 N.Y.S. 675 (1893). Company and corporation are commonly used as interchangeable terms. Goddard v. Chicago & N.W. Ry. Co., 202 Ill. 362, 66 N.E. 1066, 1068 (1903).

Health districts are established pursuant to R.C. 3709.01, which provides in part as follows:

The state shall be divided into health districts. Each city constitutes a health district and shall be known as a "city health district."

The townships and villages in each county shall be combined into a health district and shall be known as a "general health district."

A health district created pursuant to R.C. 3709.01 is an agency of the state. State ex rel. Mowrer v. Underwood, 137 Ohio St. 1 (1940). The term corporation does not generally encompass subdivisions and agencies of the state. Bazzoli v. Larson, 40 Ohio App. 321 (1931) (A county is not a corporation); Pacific Fruit & Produce Co. v. Oregon Liquor Control Division, 41 F. Supp. 175 (D.C. Or., 1941) (Liquor Control Commission is a governmental body not a corporation); People v. Dunn, 255 Ill. 289, 99 N.E. 577 (1912) (State Board of Health is a branch of state executive department and is neither a corporation or association). A health district is not, therefore, a corporation, company or association as these terms are construed according to common usage.

Thus, it is my opinion and you are so advised that a health district created pursuant to R.C. 3709.01 is not subject to the imposition of the tax imposed by R.C. 3905.36 on an association, company or corporation that purchases insurance from an insurer not authorized to do business in this state.

Opinions for July 1978 Advance Sheets will  
commence on following page 2-25







**OPINION NO. 78-010****Syllabus:**

1. The Ohio Civil Rights Commission has a statutory duty, pursuant to R.C. 4112.04 (A) (6), to act upon all charges of unlawful discriminatory practice filed by a complaining party in accordance with R.C. 4112.05 (B). The Commission may not delegate such duty to a third party.
  
2. The Ohio Civil Rights Commission has the authority, pursuant to R.C. 4112.04 (A) (5), to formulate a policy of cooperation and coordination with the United States Equal Employment Opportunity Commission. If authorized, pursuant to R.C. 107.17, the Ohio Civil Rights Commission may enter into a written agreement with the United States Equal Employment Commission whereby the Ohio Civil Rights Commission agrees to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B).

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**To: Ellis L. Ross, Executive Director, Ohio Civil Rights Commission, Columbus, Ohio**

**By: William J. Brown, Attorney General, April 11, 1978**

I have before me your request for my opinion as to the authority of the Ohio Civil Rights Commission to perform under a proposed Work Sharing Agreement with the United States Equal Employment Opportunity Commission. Your explanation of the intent of the proposed agreement is as follows:

The Ohio Civil Rights Commission is part of a nationwide program wherein state and local civil rights agencies receive Equal Employment Opportunity Funds and agree, first, to establish certain internal procedures designed to expedite case handling and, secondly, that either the Equal Employment Opportunity Commission or the state or local agency, but not both, investigate or otherwise process charges of unlawful discrimination within the jurisdiction of both against certain specified employers, thus considerably reducing duplication of effort and waste of resource caused by the prior practice in which two agencies separately enforced essentially identical substantive law. The purpose of the program is to dramatically improve the delivery of service in securing relief in employment discrimination matters and in eliminating unlawful discrimination.

. . . .

[The Work Sharing Agreement] provides, *inter alia*, that, when charges of unlawful employment discrimination against certain Ohio employers are presented to the Ohio Civil Rights Commission, these charges will be im-

mediately referred, without further action, to the Equal Employment Opportunity Commission, enabling the Equal Employment Opportunity Commission to proceed immediately pursuant to Title VII of the Civil Rights Act of 1964, as amended, without waiting for the expiration of the sixty day deferral period provided therein.

Your specific question is:

In view of the foregoing premises and noting that, as provided by Section 4112.05 (B), Revised Code, Commission response to the filing of charges of unlawful discrimination appears to be discretionary, does the Commission have the power to waive its right to proceed in any matter and refer the same to the United States Equal Employment Opportunity Commission?

Your question asks me to take note of the Commission's apparently discretionary duty under R.C. 4112.05 (B) to respond to the filing of charges of unlawful discrimination. R.C. 4112.05 (B) states in pertinent part as follows:

Whenever it is charged in writing and under oath by a person, referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in division (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02, or section 4112.021 [4112.02.1] of the Revised Code, the commission may initiate a preliminary investigation . . . If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. (Emphasis added.)

Although the statute states that the Commission "may initiate" a preliminary investigation, the use of the term is not conclusive. State, ex rel. Meyers v. Board of Education, 95 Ohio St. 367 (1917). Under the rules of statutory construction "may" may refer to either permissive or obligatory conduct depending upon the context in which the word is used. Hanton v. Frankel Bros. Realty, 117 Ohio St. 345 (1927); Sifford v. Beaty, 12 Ohio St. 189 (1861). The context of R.C. 4112.05 (B) and related provisions in R.C. Chapter 4112 indicate that the General Assembly intended to impose an imperative obligation on the Commission to act upon charges alleging unlawful discriminatory practices. Following the statement that the Commission may initiate a preliminary investigation, R.C. 4112.05 (B) sets forth the alternatives for Commission action based upon its findings in the preliminary investigation. If the Commission determines after such investigation that it is not probable that unlawful discriminatory practices have occurred, the statute directs the Commission to notify the complainant that it will not issue a complaint in the matter. If the investigation indicates that it is probable that such practices have occurred, the Commission is directed to undertake informal methods of conciliation and persuasion to eliminate such practice. The statute does not, however, address the complainant's rights or the Commission's duty in a situation where there has been no preliminary investigation by the Commission. Because of this omission, the context of R.C. 4112.05 (B) suggests that the General Assembly intended the Commission to undertake a preliminary investigation of all charges properly filed. There are, in addition, related provisions in R.C. 4112 that indicate that the Commission has a duty to act upon all charges filed with it. The most persuasive of

these related provisions is R.C. 4112.04 (A) (6) which states that "[t]he Ohio Civil Rights Commission shall . . . [r]eceive, investigate and pass upon written charges made under oath of practices prohibited by sections 4112.02 and 4112.021 of the Revised Code."

For these reasons, it is my opinion that by enacting R.C. Chapter 4112 the General Assembly intended to place an imperative duty on the Ohio Civil Rights Commission to act upon written charges of unlawful discriminatory employment practices. The Commission does have some discretion to determine the manner in which it will act. See R.C. 4112.04 (A) (4) (Commission has rule making authority); R.C. 4112.04 (A) (5) (Commission may formulate policies to effectuate the purposes of R.C. 4112.01 to 4112.11). Thus, the Commission may determine the amount and type of investigation necessary to determine if it is probable that unlawful discriminatory practices have occurred and may set standards and procedures for such investigations. This discretion does not, however, permit the Commission to abrogate its statutory duty by choosing not to act in certain cases.

Since the performance of the Commission's duty to act upon charges requires the exercise of judgement and discretion on the part of the Commission members, it is also impermissible for the Commission to delegate its duty to act to a third party such as the EEOC. Where the proper execution of a public office requires that the officer exercise his own judgment or discretion, the presumption is that the particular officer was chosen because he was deemed fit and competent to exercise that judgment or discretion. In such cases, the officer may not delegate his duties to another, unless the power to so substitute another in his place has been expressly or impliedly granted to the officer. *Reike v. Hogan*, 34 Ohio L. Abs. 311 (1940); *State, ex rel Finding v. Kohler*, 11 N.P. (n.s.) 497 (1911); 1977 Op. Att'y Gen. No. 77-084; 1973 Op. Att'y Gen. No. 73-126. Thus the Commission does not perform its statutory duty if it merely refers a charge to the EEOC and then adopts the EEOC's findings and resolution as its own without investigation.

That the Ohio Civil Rights Commission may neither abrogate nor delegate its statutory duties by referring certain charges to the EEOC is also supported by federal case law. In *Brewer v. Republican Steel Corp.*, 513 F.2d 1222 (6th Cir., 1975) the court upheld the denial of a motion by the Ohio Civil Rights Commission to intervene in a private employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e et seq., because the Commission could not show a direct, substantial interest in the litigation. In the court's view, set forth at 1223 and below, the state and federal civil rights law require independent enforcement.

The Commission's duty - and its interest - lies in enforcing the Ohio civil rights statutes, not the parallel federal laws. The federal and state provisions relating to employment discrimination overlap in application. Nevertheless, they do provide separate and independent avenues of relief that were not designed to be pursued through a unitary enforcement procedure. See *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 47-49, 94 S. Ct. 1011, 39 L. Ed.2d 147 (1974); *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

In *Alexander v. Gardner Denver Co.*, *supra*, at 47-49, the United States Supreme Court espoused its view on the independence of federal and state civil rights remedies as follows:

In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. §2000a et seq., Congress indicated that it considered the policy against discrimination to be of the "highest priority." . . . Consistent with this view, Title VII provides for consideration of

employment-discrimination claims in several forums . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. (Footnotes and citations omitted.)

Thus, in specific response to your question, it is my opinion that the Ohio Civil Rights Commission may not waive or delegate its duty to act upon a charge properly filed with the Commission by referring such charge to the Equal Employment Opportunity Commission. The Commission's statutory duty to act, however, extends only to charges filed with the Commission by the complainant within six months after the alleged unlawful discriminatory practice is committed. The Commission has no duty under Ohio law to act upon charges filed with the EEOC by parties within the jurisdiction of the Ohio Commission.

The proposed Work Sharing Agreement distinguishes between charges received initially by the Ohio Civil Rights Commission and those received initially by the EEOC. It also identifies certain charges for which it is desirable to have the Ohio Commission assume primary jurisdiction and those for which the EEOC will assume primary jurisdiction. This latter distinction does not depend upon where a charge is first filed. One stated purpose of the agreement is to enable the EEOC to assume immediate primary jurisdiction with respect to certain types of charges and charges involving certain respondents.

As concluded above, the Ohio Civil Rights Commission has an absolute duty to act whenever it receives a properly filed charge. The Commission may, however, pursuant to its powers set forth in R.C. 4112.04(A), formulate procedures it will follow in processing charges that are also filed with the EEOC, provided such procedures do not impair the Commission's ability to act in full compliance with R.C. 4112.05(B).

Whether the EEOC may assume immediate primary jurisdiction with respect to certain predetermined charges depends upon the requirements of the federal civil rights laws. It is not within my statutory authority to opine on matters of federal law and the obligations and powers of federal agencies. I shall, however, take the liberty to point out more explicitly the applicability of federal law to certain parts of the agreement in order that my conclusions herein will not be misconstrued as negating those portions of the proposed agreement controlled by federal law.

Pursuant to 42 USC §2000e-5 (c) the EEOC may not act upon a charge unless the complaining party has commenced a proceeding under any applicable state or local law and sixty days have expired since such proceedings were commenced or such proceedings have been terminated. There may, therefore, be little substantive significance to the distinction made in the proposed agreement on the basis of where the charge is first received, since all charges must be filed first with the Ohio Commission, unless the EEOC is authorized to waive the local filing requirements in 42 USC §2000e-5 (c). The EEOC's authority to waive the local filing requirements appears to depend upon the applicability of 42 USC 2000e-8 (b). This section, which gives the EEOC general authority to cooperate with state and local agencies, provides as follows:

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the

limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter. (Emphasis added.)

If the EEOC has, therefore, the authority pursuant to this section to relieve a complaining party of the local filing requirements in §2000e-5(c), supra, the EEOC may assume immediate jurisdiction with respect to charges initially received by the EEOC. It would also appear that the EEOC may pursuant to this section refrain from processing charges when such charges are being effectively handled by a state or local enforcement agency.

Again it would be inappropriate for me to interpret these federal statutes or to attempt to reconcile the EEOC's apparent authority under §2000e-8(b) with the judicial views of the independence of federal and state civil rights enforcement discussed previously. I leave, therefore, to the appropriate federal legal officer the determination of whether charges initially received by the EEOC must be referred to the state enforcement agency and when the EEOC may assume jurisdiction. Since the existence of a written cooperative agreement with a state or local agency is a condition precedent to the EEOC's authority to refrain from acting or to waive the requirements of §2000e, I must, nevertheless, further clarify the extent to which my previous conclusion limits the authority of the Ohio Civil Rights Commission to enter into such an agreement.

While the Ohio General Assembly has not expressly provided for cooperative efforts between the Ohio Civil Rights Commission and its federal counterpart, the Commission may validly adopt, pursuant to R.C. 4112.04 (A) (6), a policy of cooperating with the EEOC, if it determines that such policy will better effectuate the provisions of R.C. Chapter 4112. While the Commission does not have the authority to commit the State to participation in a federal program or to accept federal funds, the governor may, pursuant to R.C. 107.17, commit the state to participation in any federal program not authorized by existing state law for a one year period.

It would appear, therefore, that reasonable cooperative efforts between the state and federal enforcement agencies that will enhance the effective execution of their respective duties are permissible. In searching for illustrations of what might constitute acceptable cooperative efforts, I noted several in your proposed contract with the EEOC. Among these are the development of compatible employment discrimination charge forms and processing terminology, the development of compatible procedural and substantive standards, the development of inventory reduction systems and progress monitoring mechanisms, the identification of necessary legislative changes and the training of Commission personnel in the rapid charge processing procedures developed by the EEOC. Activities such as these if initiated by the Commission would clearly fall within its power to adopt rules and to formulate policies to effectuate the provisions of Chapter 4112. Such

activities are not rendered impermissible merely because they are done in cooperation with the EEOC.

It is, therefore, my opinion that the Ohio Civil Rights Commission may enter into a cooperative agreement with the Equal Employment Opportunity Commission and may agree to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B). Pursuant to its authority under R.C. 4112.14 (A) (5), the Commission may, by entering into such an agreement, waive any right it may have under federal law to exclusive sixty day jurisdiction over charges filed with it, if such right can be waived under federal law without termination of the local proceeding.

You also have submitted a second opinion request which raises two additional questions concerning the execution of the proposed work sharing agreement. Your first question in the second request asks for clarification of the rights of a complainant and the corresponding duties of the Commission upon the submission to the Commission of a proper affidavit charging a respondent with a violation of R.C. Chapter 4112. I believe my analysis herein has adequately explored the rights and duties arising from the submission of a complaint with the Commission. Your second question states as follows:

In the event that an employment charge is received from a complainant by the Commission and referred without further action to the EEOC, and the EEOC proceeds with the matter in a manner which is negligent or adversely affects the rights of the complainant as they might have been prosecuted under Ohio law by the Ohio Civil Rights Commission, does that complainant have any right of action against the Ohio Civil Rights Commission by reason of its referral of the matter to the EEOC pursuant to the provisions of the Work Sharing Agreement referred to in our request of March 16, 1978?

Since I have concluded that the Commission may not refer a charge received by it from a complainant to the EEOC without action, there is no need for me to address your second question.

Thus, it is my opinion and you are so advised that:

1. The Ohio Civil Rights Commission has a statutory duty, pursuant to R.C. 4112.04 (A)(6), to act upon all charges of unlawful discriminatory practice filed by a complaining party in accordance with R.C. 4112.05 (B). The Commission may not delegate such duty to a third party.
2. The Ohio Civil Rights Commission has the authority, pursuant to R.C. 4112.04 (A) (5), to formulate a policy of cooperation and coordination with the United States Equal Employment Opportunity Commission. If authorized, pursuant to R.C. 107.17, the Ohio Civil Rights Commission may enter into a written agreement with the United States Equal Employment Opportunity Commission whereby the Ohio Civil Rights Commission agrees to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B).

**OPINION NO. 78-011****Syllabus:**

If a person whose driver's license has been suspended pursuant to R.C. 4507.40 fails to provide proof of financial responsibility as required by R.C. 4507.41, such person is not entitled to have a motor vehicle registered in his name.

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**To: Dean L. Dollison, Bureau of Motor Vehicles, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 11, 1978**

I have before me your request for my opinion as to whether R.C. 4509.44 is applicable where a person whose driver's license has been suspended pursuant to R.C. 4507.40 fails to provide proof of financial responsibility as required by R.C. 4507.41.

R.C. 4507.40 establishes a system of points assessed against an individual driver according to the nature of the traffic offense that he has committed. R.C. 4507.40 (K) indicates that if a person has charged against him a total of not less than twelve points within a period of two years from the date of the first conviction, that person's license shall be suspended for six months. R.C. 4507.41 requires any person whose license has been suspended and who is seeking the return of said license, to demonstrate to the satisfaction of the registrar that he is a qualified driver, and to give and maintain proof of financial responsibility. R.C. 4509.45 describes the evidence that shall constitute sufficient proof of financial responsibility in order to satisfy the requirements of R.C. 4507.41. Moreover, R.C. 4509.44 states that "[n]o motor vehicle shall be or continue to be registered in the name of any such person required to file proof of financial responsibility unless such proof is furnished and maintained in accordance with §4509.45 of the Revised Code." Due to the absence of any qualifying language in R.C. 4509.44 limiting its application to specific incidents where proof of financial responsibility is required, I must conclude that R.C. 4509.44 applies to all situations in which proof of financial responsibility is required.

Thus, in specific answer to your question, it is my opinion and you are so advised that if a person whose driver's license has been suspended pursuant to R.C. 4507.40 fails to provide proof of financial responsibility as required by R.C. 4507.41, such person is not entitled to have a motor vehicle registered in his name.

**OPINION NO. 78-012****Syllabus:**

1. Where the Department of Public Welfare obtains subrogation rights, under R.C. 5101.58, as the result of an automobile accident, the Department is a party "claiming an interest arising out of a motor vehicle accident," and is therefore entitled to an accident report from the Director of Highway Safety under R.C. 5502.12.
2. Where the Director of Highway Safety issues an accident report, pursuant to R.C. 5502.12, to the Department of Public Welfare, R.C. 115.45 requires

that the Department of Public Welfare pay the statutory fee of one dollar.

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To: **Robert M. Chiarmonte, Director, Ohio Dept. of Highway Safety, Columbus, Ohio**

By: **William J. Brown, Attorney General, April 11, 1978**

I have before me your request for an opinion on the following questions:

1. May the Department of Highway Safety release to the Department of Public Welfare copies of accident reports received under R.C. 5502.12?
2. If so, may such reports be sent without charge to the Department of Public Welfare?

R.C. 5502.11 provides:

Every state highway patrolman, sheriff, deputy sheriff, police officer, or other law enforcement officer investigating a motor vehicle accident shall, within 5 days, forward a written report of such accident to the director of highways and a copy to the director of highway safety on a form which the director of highways shall adopt subject to the provisions of sections 119.01 to 119.13, inclusive, of the Revised Code.

Distribution of the accident reports is controlled by R.C. 5502.12. That section provides:

The accident reports submitted pursuant to section 5502.11 of the Revised Code shall be for the use of the director of highway safety for purposes of statistical, safety, and other studies. The director of highway safety shall furnish a copy of such report to any person claiming an interest arising out of a motor vehicle accident, or to his attorney, upon the payment of a fee of one dollar, and with respect to accidents investigated by the state highway patrol, the director of highway safety shall furnish to such person all related police reports, statements, and photographs upon the payment of said fee of one dollar and the cost of each document and photograph reproduced by said department.

Such state highway patrol reports, statements, and photographs may, in the discretion of the director of highway safety, be withheld until all criminal prosecution has been concluded; and the director of highway safety may require proof, satisfactory to him, of the right of any applicant to be furnished such documents. (Emphasis added.)

Under R.C. 5101.58, the Department of Public Welfare is granted a right of subrogation ". . . for the liability of a third party for the cost of medical services and care arising out of injury, disease, or disability of an applicant for or recipient of medical assistance . . ." It is therefore clear that the Department of Public Welfare is "a person claiming an interest arising out of a motor vehicle accident" under R.C. 5502.12, *supra*, in any accident in which a recipient of medical assistance is injured and requires medical services which are paid for in whole or in part by the Department. This is not to say, however, that the Department of Public Welfare should be allowed to examine all accident reports. It may only

request those reports which relate to accidents that result in the Department having to make medical payments. Accordingly, your first question is answered in the affirmative.

The second question you raise involves the very practical problem of who should pay for the reports which are issued to the Department of Public Welfare. It appears that this question is answered by R.C. 115.45 which provides, in pertinent part, as follows:

All service rendered and property transferred from one institution, department, improvement, or public service industry to another shall be paid for at its full value. No institution, department, improvement, or public service industry shall receive financial benefit from an appropriation made or fund created for the support of another . . .

Thus, where your department supplies an accident report to the Department of Public Welfare, then the Department of Public Welfare is required, under R.C. 115.45, to pay "its full value." Under R.C. 5502.12, *supra*, the statutory fee for providing such reports is one dollar, and such fee should therefore be paid by the Department of Public Welfare prior to issuing the accident report.

Accordingly, it is my opinion and you are so advised, that:

1. Where the Department of Public Welfare obtains subrogation rights, under R.C. 5101.58, as the result of an automobile accident, the Department is a party "claiming an interest arising out of a motor vehicle accident," and is therefore entitled to an accident report from the Director of Highway Safety under R.C. 5502.12.
2. Where the Director of Highway Safety issues an accident report, pursuant to R.C. 5502.12, to the Department of Public Welfare, R.C. 115.45 requires that the Department of Public Welfare pay the statutory fee of one dollar.

#### OPINION NO. 78-013

**Syllabus:**

CETA participants and welfare recipients who are "loaned" to the Department of Natural Resources, and who are under the supervision of the Department while performing services are "employees" of the Department for purposes of R.C. 9.83.

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**To: Robert W. Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio**

**By: William J. Brown, Attorney General, April 11, 1978**

I have before me your request for an opinion on the following question:

Are CETA workers who are loaned to the Department of Natural Resources by the sponsoring agency or public relief workers who are required by the county to work

on public property and loaned to the Department covered by the Department's insurance policy against third-party liability when they operate state equipment?

As you indicate, R.C. 9.83 allows the state and the various subdivisions to join a self insurance fund and to ultimately purchase liability insurance. The section provides, in part, as follows:

(A) The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability on account of damage or injury to persons and property, including liability on account of death or accident by wrongful act, occasioned by the operation of such motor vehicles as are automobiles, trucks, motor vehicles with auxiliary equipment, self-propelling equipment or trailers, aircraft or watercraft by employees or officers of the state or a political subdivision, while such vehicles are being used or operated in the course of the business of the state or the political subdivision. On and after the effective date of this section and until liability insurance is in force pursuant to division (B) of this section in the absence of liability insurance authorized by this section, the state is authorized to expend funds to pay judgments rendered in any court against its employees of [or] officers, that result from the employee's or officer's operations of one of the aforementioned vehicles where the employee or officer was acting in the course of his employment, and is authorized to expend funds to compromise claims for liability against its employees of [or] officers, that result from the employee's or officer's operation or use the aforementioned vehicles in the course of his employment. . . (Emphasis added.)

Under this section, the answer to your question turns upon the definition of "employee."

The Comprehensive Employment and Training Act (CETA), 29 U.S.C. §801, et seq., has as its purpose the provision of "job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons . . . ." To achieve this end, the federal government makes grants to "sponsoring" agencies of state and local governments. Participants for the programs operated by the sponsors are selected on the basis of need and paid with the federal grant monies.

Discussions with members of your office reveal that ODNR has become involved with CETA participants in two ways. Under one program, ODNR is itself the sponsoring agency. Participants are selected by ODNR and are processed through your personnel office. They are paid directly by ODNR, although the funding is federal, and all services performed by these participants are performed for ODNR. Your question, however, does not relate to these participants. Under the second system, CETA participants are "loaned" to ODNR by other sponsors. These other sponsors are the agencies which select the participants and the participants are processed and paid through that sponsor. They are loaned to ODNR because ODNR has jobs for them at times when the original sponsor does not. Although the processing and payment of these loaned CETA participants continues to be conducted by the original sponsor, the actual job site supervision is handled by ODNR. Your department has also indicated that a similar situation exists with respect to the welfare recipients about whom you inquire. Certain counties impose the condition of work upon receipt of welfare benefits, and at times these counties ask that ODNR supply recipients with such work. As is the

case with loaned CETA participants, the "payrolls" are handled by the counties, but the actual job site supervision is handled by ODNR.

The word "employee" is not defined by R.C. 9.83. "Employee" is defined in at least three other sections of the Revised Code, see R.C. 4101.01(D), 4121.13, and 5903.02, but in each instance, the definition is limited by its own terms to the particular Revised Code chapter in which it appears. None of these definitions is controlling for purposes of R.C. 9.83.

In order to better understand what is meant by the word "employee" in R.C. 9.83, it is necessary to analyze the purpose of the statute. In waiving tort liability under R.C. 2743.02, the state is now a potential defendant, and it appears that the purpose of R.C. 9.83 is to protect not only the employees, but the agency as well. For this reason, the category included within the definition of "employee" should be broad enough to include all persons whose negligence would involve potential liability to the agency. In order to resolve that issue, common law principles of respondeat superior must be analyzed.

Federal case law reveals that CETA participants would not be considered federal employees for purposes of imposing liability. Although the issue has not been decided specifically with respect to CETA, in an analogous case, Vincent v. U.S., 383 F. Supp. 471 (E.D. Ark., 1974), affirmed, 513 F. 2d 1296 (8th Cir., 1975), it was held that the mere fact that a person was paid with federal grant monies did not render the federal government liable for his torts under the Federal Tort Claims Act. In that case the funding grant was an OEA grant. The court reasoned that the determinative factor in resolving the issue of liability was not the mode or source of payment but rather the right to supervise and direct the manner in which services are performed. Accord: Hines v. Cenla Community Action Committee, 474 F. 2d 1052 (5th Cir., 1973). Robles v. El Paso Community Action Agency, 456 F. 2d 189 (5th Cir., 1972). But see Orleans v. U.S., 513 F. 2d 197 (6th Cir., 1975).

For purposes of determining the liability of the master for the torts of the servant, Ohio has also followed the "right to control" test. Simply put, the test states that he who controls the servant must bear the risk of liability for that servant. The rule has been ardently applied in "loaned servant" cases where the issue of who is the actual master is material. Thus, in Ragone v. Vitali & Beltrami, 42 Ohio St. 2d 161, 172 (1975), the following test was reiterated:

In determining whether, in respect of a particular act, a servant, in the general employment of one person, who has been loaned for the time being to another is the servant of the original employer or the person to whom he has been loaned, the test is whether in the particular service which he is engaged to perform, the servant continues liable to the direction and control of his general employer or becomes subject to that of the person to whom he is lent, - whether the latter is in control as proprietor so that he can at anytime stop or continue the work and determine the way in which it is to be done, with reference not only to the result reached but to the method of reaching it.

(Giovinale v. Republic Steel Corp., 151 Ohio St. 161 (1949) and Halkias v. Wilkoff Co., 141 Ohio St. 139 (1943), approved and followed.)

Numerous other cases support the view that liability follows the right to control. See, e.g. Gilmore v. Grandview Cement Products, Inc., 116 Ohio App. 313 (1962). Board of Education v. Rhodes, 109 Ohio App. 415 (1959). Home Ins. Co. v. Bd. of Comms., 88 Ohio App. 91 (1949), appeal dismissed, 153 Ohio St. 538 (1950).

Under this test the loaned CETA participants and welfare recipients you describe present a potential source of liability to ODNR. Keeping in mind the apparent purpose of R.C. 9.83 to protect the agencies of the state as well as

"employees" from third party liability, I am of the opinion that the word "employee" should be construed to include any person representing a potential source of liability to the agency and therefore includes these workers. In reaching this conclusion I rely solely upon R.C. 9.83 and therefore do not reach numerous other related questions, particularly the questions of whether these workers are state employees for purposes of the state retirement system or whether they are classified civil servants.

Accordingly, it is my opinion that:

CETA participants and welfare recipients who are "loaned" to the Department of Natural Resources, and who are under the supervision of the Department while performing services are "employees" of the Department for purposes of R.C. 9.83.

### OPINION NO. 78-014

#### Syllabus:

Levy funds raised pursuant to a fire levy under R.C. 5705.19 (I) may not be used for the purpose of purchasing ambulance equipment or for providing ambulance or emergency medical service. Funds for such purposes must be raised under a separate levy pursuant to R.C. 5705.19 (U). (1969 Op. Att'y Gen. No. 69-123 overruled.)

**To: Donald L. Jones, Washington County Pros. Atty., Marietta, Ohio**  
**By: William J. Brown, Attorney General, April 13, 1978**

I have before me your request for my opinion regarding a tax levy for ambulance service. Specifically, you have raised the following question:

Can monies collected as part of a fire levy pursuant to Ohio Revised Code Section 5705.19 (I) be used to purchase ambulance equipment and/or ambulance service in view of the fact that in 1974 the General Assembly added subparagraph (U) to section 5705.19 which now permits a taxing authority to levy a tax in excess of the ten mill limitation for the purpose of "providing ambulance service, emergency medical service, or both?"

The relevant portions of R.C. 5705.19 are as follows:

The taxing authority of any subdivision at any time and in any year, by vote of two-thirds . . . may declare by resolution to the board of elections . . . that the amount of taxes . . . raised within the ten mill limitation will be insufficient to provide for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:

. . .

(I) For the purpose of providing and maintaining fire apparatus, appliances, buildings, or sites therefor, or sources of water supply and materials therefor, or the

establishment and maintenance of lines of fire alarm telegraph or the payment of permanent, part-time, or volunteer firemen or fire fighting companies to operate the same;

. . .

(U) For providing ambulance service, emergency medical service, or both.

Such resolution shall be confined to a single purpose and except as hereafter provided, and shall specify the amount of increase in rate which it is necessary to levy . . . (Emphasis added.)

As you indicate in your request, my predecessor, in 1969 Op. Att'y Gen. No. 69-123, determined that a board of township trustees could expend funds raised under an R.C. 5705.19 (I) levy for the purpose of "furnishing ambulance service to its citizens." Subparagraph (U) was enacted by the General Assembly after that opinion. Therefore, the issue presented is whether the enactment of subparagraph (U) now requires a separate levy for ambulance service.

Ohio law clearly requires a new levy for ambulance service be passed. As indicated, subparagraph (U) is newly enacted. It allows a tax levy for ambulance service. Ohio authority has consistently found that each of the various subparagraphs of R.C. 5705.19 constitutes a "single purpose" and therefore the funds raised under a levy passed pursuant to one subparagraph, may not be used for purpose set forth in a different subparagraph.

The following examples illustrate the point. In 1967 Op. Att'y Gen. No. 67-107 my predecessor considered the question of whether funds raised "for general construction, reconstruction, resurfacing, and repair of roads and bridges in counties or townships," pursuant to R.C. 5705.19 (G) could be used to finance a sewer and storm drain master plan. The opinion concluded that such a use of levy funds was not permissible, relying largely upon subparagraph (M) which allows a levy "for regional planning." My predecessor reasoned that:

Subsections (G) and (M) of Section 5705.19, Revised Code, are separate purposes. The master plan for the purpose contemplated would require a levy pursuant to Section 5705.19 (M) . . .

The case of Roddy v. Andrix, 32 Ohio Ops.2d 349 (Madison Co. Common Pleas, 1964) reached the same result. In that case, taxpayers brought an action to enjoin the expenditure of certain levy funds. The levy in question had been approved under R.C. 5705.19 (L) "for the purpose of the maintenance and operation of schools for retarded children." The county commissioners had plans for using the funds for the purpose of real estate for such a school. The court found in favor of the taxpayers. Relying upon R.C. 5705.19 (F), which provides that a taxing authority may authorize a levy "for the construction or acquisition of any specific permanent improvement or class of improvements . . .," the court made the following observation:

The words "single purpose" are plain and unambiguous. The several purposes are set out in subsections (A) through (L) are single purposes. Roddy, at 350.

Application of this test to your request necessitates a negative answer. A levy for fire apparatus and payment of firemen is authorized by R.C. 5705.19 (I). A levy for ambulance service is authorized by R.C. 5705.19 (H). Each is a separate purpose, and funds raised under a levy for one may not be used for the other.

One further point deserves discussion. In 1969 Op. Att'y Gen. No. 69-038 my predecessor determined that a township which maintained a fire department could

operate an ambulance through the fire department. R.C. 5705.19 (U) in no way affects that authority. It does, however, require a separation of funds since the proceeds of a fire levy under R.C. 5705.19 (I) can no longer be used to provide ambulance service. While such a situation could entail accounting problems for the township, there is little doubt that levys under R.C. 5705.19 (I) and (U) can not be simply thrown together into one "fire department" fund. And, of course, there is no prohibition on using "inside" levy proceeds for that portion of the township fire department's budget which represents ambulance service.

Accordingly, it is my opinion, and you are so advised that:

Levy funds raised pursuant to a fire levy under R.C. 5705.19(I) may not be used for the purpose of purchasing ambulance equipment or for providing ambulance or emergency medical service. Funds for such purposes must be raised under a separate levy pursuant to R.C. 5705.19(U). (1969 Op. Att'y Gen. No. 69-123 overruled.)

#### OPINION NO. 78-015

##### Syllabus:

1. Upon receipt of a writ of possession issued pursuant to R.C. 2327.02 (C) as part of a foreclosure action, the county sheriff must deliver actual and exclusive possession to the purchaser at a judicial sale, even where delivery of such possession requires forcible removal of the occupant, provided that the occupant was a party to the foreclosure action.
2. R.C. 1923.01, which vests jurisdiction over actions in forcible entry and detainer in municipal and county courts, does not prevent a county sheriff from forcibly removing an occupant from foreclosed premises under a writ of possession, and delivering possession to a purchaser at a judicial sale.

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To: **Anthony J. Pizza, Lucas County Pros. Atty., Toledo, Ohio**  
By: **William J. Brown, Attorney General, April 14, 1978**

I have before me your request for my opinion on the following questions:

1. Upon receipt of a writ of possession as part of a foreclosure action, must the sheriff deliver actual possession to the purchaser at a judicial sale, even where delivery requires forcible removal of the occupant?
2. Would the answer to question number one be affected by whether or not the occupant was a party to the foreclosure proceedings?
3. What effect does the Forcible Entry and Detainer Statute, particularly as it vests jurisdiction in the Municipal Courts, have upon the authority of the Sheriff to enforce writs of possession?

In a foreclosure proceeding, once the sale has been completed and approved by the court, the purchaser is entitled to both a sheriff's deed and a writ of possession. Poole v. Loan and Bldg. Co., 4 O. Dec. 504 (1896). The sheriff is thereupon authorized and directed to execute the writ pursuant to R.C. 2327.02(C), which specifies that the writ shall contain specific description of the property and a command to the sheriff to deliver it to the person entitled thereto.

One of my predecessors, in 1933 Op. Att'y Gen. No. 1913, p. 1809, addressed the issue posed by your first question. In considering a situation where the occupants of property were defendants in the original action wherein a judicial sale was had, my predecessor concluded that it is the mandatory duty of the sheriff to serve the writ of possession provided for by G.C. 11654, now R.C. 2327.02. Moreover, my predecessor concluded that where the occupants refuse to leave the premises, it is the duty of the sheriff to remove them and their personal property from the premises and to deliver possession to the purchaser.

A similar conclusion was reached in Tetterbach v. Meyer, et al., 10 O. Dec. Rep. 212 (1888), where the court reasoned that if the sheriff were unable to enforce a writ of possession by physically removing an occupant who was a party to the foreclosure suit, the issuance of the writ would be an idle gesture. The court added that where the occupant was a party to the foreclosure, there would be no point in requiring the purchaser to initiate an action in forcible entry and detainer, as had been urged by the defendant, because there were no issues to litigate. It is, therefore, my conclusion also that the provisions of R.C. 2327.02(C) require that a county sheriff enforce a writ of possession upon an occupant of foreclosed premises, where the occupant was a party to the foreclosure proceedings, by physically removing that occupant if he fails to vacate voluntarily.

It should be noted, however, that the foregoing conclusion applies only in those instances in which the party against whom physical removal is sought was also a party to the foreclosure action. If the occupant of the premises was not a party to the foreclosure action, a writ of possession cannot be enforced against him. The Court of Appeals for Summit County held, in Nunn v. Hutchinson, 1 Ohio Law Abs. 282 (1922) that a writ of possession can be used only against the parties to the foreclosure suit, and cannot be used to disturb the possession of a stranger to the suit. The court further held that a writ should be executed only when the right is clear, for it cannot be used to litigate conflicting rights not already adjudicated. The plaintiff in that case took possession under a lease from the mortgagor. When the mortgagee initiated foreclosure, he neglected to join the plaintiff. An injunction was granted to the plaintiff to prevent enforcement of the writ. Under this holding, it is clear that a sheriff may not enforce a writ against an occupant who was not a party to the foreclosure action.

Your final question raises the possibility of a jurisdictional conflict between the provisions of R.C. 2327.02 and those of R.C. 1923.01, *et seq.* and R.C. 1901.18, which grant jurisdiction in actions in forcible entry and detainer to the county and municipal courts. R.C. 1923.01, in pertinent part, provides as follows:

As provided in sections 1923.01 to 1923.14 inclusive, of the Revised Code, any judge of a county court, within his proper area of jurisdiction, may inquire about persons who make unlawful and forcible entry into lands and tenements and detain them, as well as about persons who have a lawful and peaceable entry into lands and tenements and hold them unlawfully and by force. If upon such inquiry it is found that an unlawful and forcible entry has been made, and that the lands or tenements are held by force, or that after a lawful entry they are held unlawfully, then such judge shall cause the party complaining to have restitution thereof.

R.C. 1923.02(C) specifies that proceedings under the provisions of R.C. Chapter 1923 may apply to sales of real estate, on executions, orders, or other judicial

process, provided that the judgment debtor was in possession at the time of the judgment or decree which gave rise to the sale. R.C. 1901.18(A) specifies that a municipal court, within its territory, shall have original jurisdiction in any civil action, of whatever nature or remedy, wherein judges of county courts have jurisdiction. Original jurisdiction over actions in forcible entry and detainer is thus vested in the county and municipal courts.

While the jurisdiction thus vested is original, it is not exclusive. R.C. 1923.03 indicates that such jurisdiction over actions for forcible entry and detainer is concurrent with that of the court of common pleas in the following terms:

Judgments under sections 1923.01 to 1923.14, inclusive, of the Revised Code, either in the county court or in the court of common pleas, are not a bar to a later action brought by either party. (Emphasis added.)

Thus, in Kuhn v. Griffin, 3 Ohio App.2d 195 (1964), the Court of Appeals for Lucas County held that the court of common pleas has original jurisdiction in forcible entry and detainer concurrent with that of the county and municipal courts.

In summary, the purchaser of real property at a judicial sale may obtain actual possession thereof through one of two methods where an occupant of the premises who was a party to the foreclosure proceedings refuses to vacate voluntarily. The purchaser is entitled to both a sheriff's deed and writ of possession, which must be executed by the county sheriff, who has a duty to deliver actual and exclusive possession to the purchaser, even where such delivery requires forcible removal of the occupant. The purchaser may, however, elect to obtain possession against an occupant who was a party to the foreclosure proceedings through an action in forcible entry and detainer. Although the purchaser is not required to initiate an action in forcible entry and detainer, he may do so. Where the occupant of foreclosed premises was not a party to the foreclosure proceedings, the purchaser at a judicial sale must obtain possession through an action in forcible entry and detainer. It is, therefore, my opinion and you are so advised that:

1. Upon receipt of a writ of possession issued pursuant to R.C. 2327.02 (C) as part of a foreclosure action, the county sheriff must deliver actual and exclusive possession to the purchaser at a judicial sale, even where delivery of such possession requires forcible removal of the occupant, provided that the occupant was a party to the foreclosure action.
2. R.C. 1923.01, which vests jurisdiction over actions in forcible entry and detainer in municipal and county courts, does not prevent a county sheriff from forcibly removing an occupant from foreclosed premises under a writ of possession, and delivering possession to a purchaser at a judicial sale.

#### OPINION NO. 78-016

#### Syllabus:

The Board on Unreclaimed Strip Mined Lands has the authority as a matter of law to fund reclamation projects on private lands pursuant to Chapter 1513 of the Revised Code even though such lands may be subject to clean-up orders issued by

the Director of the Ohio Environmental Protection Agency. This opinion does not address the propriety of such an action from a policy perspective.

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**To: Arthur R. Bowers, Chairman, Board on Unreclaimed Strip Mined Lands, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 14, 1978**

I have before me your request for my opinion regarding the funding of a reclamation project on private lands pursuant to Chapter 1513 of the Revised Code when such lands may be subject to cleanup orders issued by the Director of the Ohio Environmental Protection Agency.

Section 1513.30 creates the unreclaimed lands fund. The purpose of this fund is to reclaim land:

"public or private, affected by mining . . . for which no cash is held in the strip mining reclamation fund or the surface mining reclamation fund." (Emphasis added.)

In addition to these requirements, Section 1513.30 provides further criteria concerning the feasibility, cost, and the public benefits of reclaiming the areas, but there exists nothing that would preclude your funding this project merely because it is located on private land. Amended Substitute House Bill No. 244 revised Section 1513.30 this past year to specifically authorize your board to fund projects on private lands.

Section 6111.03(H) does provide the director of environmental protection with the authority to issue orders to prevent, control, or abate water pollution. If the private lands project that your board is considering involves the abatement of water pollution it would appear that you will be funding a project on land subject to possible orders from the director of environmental protection. I find nothing in Chapter 6111, however, that would preclude your funding such a project, but Section 3745.011(E) of the Revised Code does provide that:

It is the intent of the general assembly that the environmental protection agency shall operate the state government in ways designed to minimize environmental damage, and assist and cooperate with governmental agencies to restore, protect, and enhance the quality of the environment.

I must further point out that your board is created within the Ohio Department of Natural Resources and Section 1501.02 of the Revised Code provides that:

The director [of Natural Resources] shall co-operate with, and not infringe upon the rights of, other state departments . . . and agencies . . . in the conduct of . . . matters in which the interests of the department of natural resources and such other departments and agencies overlap.

These two sections of the Revised Code suggest a coordinated effort between your board and the Ohio Environmental Protection Agency is warranted whenever there exists the kind of overlap with which you are now faced.

In specific answer to your question, it is my opinion, and you are so advised, that your board has the authority as a matter of law to fund reclamation projects on private lands pursuant to Chapter 1513 of the Revised Code even though such lands may be subject to clean-up orders issued by the Director of the Ohio Environmental Protection Agency. For the reasons stated above, however, this opinion does not address the propriety of such an action from a policy perspective.

**OPINION NO. 78-017****Syllabus:**

A township trustee may, pursuant to R.C. 505.011, serve in the volunteer fire department of another township, even though that other fire department has a contract to provide fire protection to the township for which he is trustee, provided that the trustee receives no compensation from the township for providing such protection. (1960 Op. Att'y Gen. No. 1166, p. 120, overruled.)

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**To: Stephan M. Gabalac, Summit County Pros. Atty., Akron, Ohio**  
**By: William J. Brown, Attorney General, April 14, 1978**

I have before me your request for an opinion which raises the following questions:

1. May a township trustee be a member of another township's volunteer fire department, such department contracting to provide fire protection for the township of which he is trustee?
2. If such person cannot occupy both positions, does the fact that he has been elected township trustee work a forfeiture of his position on the volunteer fire department, or does it require, if such person refuses to resign from the fire department, the institution of proceedings to remove such person from his position as township trustee?

As you indicate in your request, the statutory provision most closely related to your question is found in R.C. 505.011. That section provides as follows:

A member of a board of township trustees may be appointed as a volunteer fireman and in such capacity be considered an employee of the township, or he may be a member of a private fire company which has entered into an agreement to furnish fire protection for the township of which such member is trustee; provided that such member shall not receive compensation for his services as a volunteer fireman. (Emphasis added.)

This statutory provision became effective in 1967 and effectively negated the conclusion reached in 1960 Op. Att'y Gen. No. 1166, p. 120. The syllabus of that opinion reads as follows:

Under Section 505.37, Revised Code, a member of a board of township trustees may not be employed by the township to maintain and operate fire fighting equipment and may not serve on a volunteer fire department which has entered into an agreement with the township to furnish fire protection, as such employment is incompatible with the office of a member of a board of township trustees.

The obvious purpose of R.C. 505.011 is to allow township trustees to serve their communities as volunteer firemen without jeopardizing their trusteeship. The

only caveat is that the trustee may not receive any compensation. Keeping this purpose in mind, there appears to be no reason why a township trustee can not serve in the volunteer fire department of a different township, even if that department is under contract to provide fire protection to the township which the trustee serves. While the statute does not specifically provide for the particular facts about which you inquire, the intent is clear. The only restriction is that the trustee may not receive any compensation for his services.

My answer to your first question renders an answer to your second question unnecessary.

Accordingly, it is my opinion, and you are advised that:

A township trustee may, pursuant to R.C. 505.011, serve in the volunteer fire department of another township, even though that other fire department has a contract to provide fire protection to the township for which he is trustee, provided that the trustee receives no compensation from the township for providing such protection. (1960 Op. Att'y Gen. No. 1166, p. 120, overruled.)

#### OPINION NO. 78-018

##### Syllabus:

Article II, §20, Ohio Constitution prohibits any increase in per diem payments to a school board member resulting from the enactment of Am. S.B. No. 248 where such member held office prior to the effective date of such act. (1965 Op. Att'y Gen. No.65-206 overruled).

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To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio  
By: William J. Brown, Attorney General, April 14, 1978

I have before me your request for my opinion which reads, in pertinent part, as follows:

Is the compensation mentioned in Section 3313.12, as increased by Amended Senate Bill 248, a reimbursement of expenses, or does it constitute salary of the school board member receiving this compensation? Secondly, is this compensation available to school board members whose terms commence prior to the effective date of Amended Senate Bill 248?

As you state in your letter, Am. S.B. No. 248 (eff. November 21, 1977) amended R.C. 3313.12 to allow boards of education, other than county boards, by resolution to provide compensation to its members not to exceed forty dollars per meeting. Prior to the effective date of this act, R.C. 3313.12 provided for up to twenty dollars compensation per meeting.

Article II, §20, Ohio Constitution, provides as follows:

The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

In 1965 Op. Att'y Gen. No. 65-206, my predecessor analyzed the effect of this constitutional provision upon an increase of a school board member's per diem allowance, where such allowance was increased during the member's existing term. He concluded that such school board members were entitled to receive in term increases of their per diem allowances. This opinion was apparently grounded on the theory that such an allowance was not "salary" but "compensation" and therefore not proscribed by Article II, §20, Ohio Constitution.

Subsequent to that opinion, the Supreme Court, in State, ex rel. Artmayer v. Board, 43 Ohio St.2d 62 (1975) stated in its syllabus that:

The terms "salary" and "compensation" as used in Section 20, Article II of the Ohio Constitution, are synonymous.

The Court commented, at pp. 63-64, that the distinction relied upon in Op. No. 65-206 has been uniformly rejected by Ohio courts. It noted, at p. 65, that the question to be asked in determining whether the in-term salary prohibition of Article II, §20, Ohio Constitution has been violated is whether the number of dollars payable to an incumbent of a public office are increased by the enactment of a statute during his term of office.

I concluded, in 1977 Op. Att'y gen. No. 77-083, that a township trustee is not permitted to receive an increase in per diem compensation if his existing term in office commenced before the effective date of the act providing for such increase. The same result obtains in the instant situation. The per diem is specifically denominated "compensation" in R.C. 3313.12. Moreover, the number of dollars payable to the incumbent board members is increased. Accordingly, I am constrained to overrule Op. No. 65-206 and conclude that Article II, §20, Ohio Constitution prohibits any increase in per diem payments to a school board member resulting from the enactment of Am. S.B. No. 248 where such member held office prior to the effective date of such act. (1965 Op. Att'y Gen. No. 65-206 overruled).

#### OPINION NO. 78-019

##### Syllabus:

1. A county sheriff does not have a duty to transport municipal court jurors.
2. A county sheriff does not have a duty to accompany municipal court prisoners to court during trials and hearings prior to conviction.
3. A municipal court is not responsible for the costs of housing prisoners sentenced by the court to the county jail.

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To: Arthur M. Elk, Ashland County Pros. Atty., Ashland, Ohio  
By: William J. Brown, Attorney General, April 14, 1978

I have before me your request for my opinion which may be summarized as follows:

1. Does a sheriff have a duty to provide transportation to members of a municipal court jury when a jury view has been ordered by the court?

2. Must a sheriff accompany municipal court prisoners to court during hearings and trials prior to conviction?
3. Is the municipal court required to make payments on a regular basis for the housing of their prisoners sentenced to the county jail?

With respect to your first two questions, it is necessary to consider the statutory duty of a sheriff to provide service to the judicial branch of government. R.C. 311.07, which sets forth the general duties of the sheriff, imparts upon a sheriff the duty to "attend upon the court of common pleas and the court of appeals during their sessions, and when so required, shall attend upon the probate court."

R.C. 311.07 does not impose upon the sheriff a general duty to attend upon the municipal court. To the contrary, the general duty to attend upon the municipal court rests, pursuant to R.C. 1901.32, with municipal and township police officers. R.C. 1901.32(D), which provides for municipal court bailiffs, states as follows:

Every police officer of any municipal corporation or police constable of a township within the territory is ex officio a deputy bailiff of the court in and for the municipal corporation or township within which he is commissioned as such police officer or police constable and shall perform such duties in respect to cases within his jurisdiction as are required of him by a judge of said court or by the clerk or bailiff or deputy bailiffs thereof, without additional compensation.

R.C. 1901.32(E) provides, moreover, that "[t]he bailiff and deputy bailiffs shall perform for the [municipal] court services similar to those performed by the sheriff for the court of common pleas, and shall perform such other duties as are required by rule of court."

While there are exceptions to these general statutes that do require a sheriff to perform specific duties for a municipal court, such as the provision in R.C. 2949.08 which requires a sheriff to transport a sentenced misdemeanant to jail, there is no statutory exception applicable to your specific questions. Accordingly, it must be concluded that the duty to transport municipal court jurors does not fall upon the sheriff, but rather upon the bailiff of such a court. Similarly, a sheriff would not have a duty to accompany municipal court prisoners to court during trials and hearings prior to conviction.

With respect to your final question, I am unable to find any express statutory duty requiring a municipal court to make payments to the county jail to cover the costs of prisoners sentenced to that facility by the municipal court. Rather, costs are to be paid by the political subdivision on whose behalf the charges were brought. Thus, in state misdemeanor cases the county must pay the costs, and in ordinance cases the municipality must make the payments to the county jail. See, 1976 Op. Att'y Gen. No. 76-012; 1956 Op. Att'y Gen. No. 6768; 1955 Op. Att'y Gen. No. 1133; Cf. University Hospitals of Cleveland v. Cleveland, 28 Ohio Misc. 134 (C.P. Cuyahoga Co., 1971) (where a municipal prisoner is housed in the county jail, the municipal corporation is liable to the county for reimbursement of expenses.) Accordingly, it is not the responsibility of the municipal court to pay the county jail for the costs of housing prisoners sent to that facility by that court.

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

1. A county sheriff does not have a duty to transport municipal court jurors.

2. A county sheriff does not have a duty to accompany municipal court prisoners to court during trials and hearings prior to conviction.
3. A municipal court is not responsible for the costs of housing prisoners sentenced by the court to the county jail.

### OPINION NO. 78-020

#### Syllabus:

1. The State Library Board may, under R.C. 3375.01 (E), approve a resolution which provides for creation of two separate county library districts in the same county if the State Board determines that such action would best promote "a statewide program of development and coordination of library services."
2. The State Library may, under R.C. 3375.01 (E), approve a resolution for creation of a county library district, even though such resolution does not comply with the strict territorial requirements of R.C. 3375.19 or 3375.20, if the State Board determines formation of such a county library district would best promote "a statewide program of development and coordination of library services."

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**To: Ira Phillips, Librarian, The State Library of Ohio, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 18, 1978**

I have before me your request for my opinion regarding formation of two county library districts in Butler County. Your request reads, in part, as follows:

The Board of Trustees of the Lane Public Library in Hamilton, Ohio has proposed conversion from a school district library to a county district library. The proposed district would cover only the territory now covered by the library district and not the entire county. The Lane Public Library has been designated a county extension library. The Middletown Free Public Library, a municipal library in Butler County, is also designated county extension library.

. . . .

[T]he two libraries agreed to divide Butler County diagonally with each library serving a specific area. No district is served by more than one library.

Therefore, you have raised the following questions:

1. Can two county district libraries be formed in one county?
2. Can a county district library be formed to serve only the areas it is presently serving and not expand to include other territory?

Before addressing your questions specifically, a brief discussion of the powers of the State Library Board is appropriate. Under R.C. 3375.01 the State Library Board is vested with broad supervisory power over the state's numerous libraries. The section provides, in pertinent part, as follows:

The state library board is responsible for the state library of Ohio and a statewide program of development and coordination of library services, and its powers include the following:

. . . .

(E) Approve, disapprove, or modify resolutions for establishment of county district libraries, and approve, disapprove, or modify resolutions to determine the boundaries of such districts, along county lines, or otherwise, . . .

In 1975 Op. Att'y Gen. No. 75-026, this office had occasion to consider the powers of the State Library Board under R.C. 3375.01. At that time it was my opinion that the State Library Board had powers beyond those granted to counties, townships, municipal corporations, and school districts elsewhere in R.C. Chapter 3375. In essence, the conclusion of that opinion was that the State Library Board could establish boundaries for proposed county library districts in any manner it saw fit in order to best promote "development and coordination of library services" across the state.

The broad powers which the State Library Board now enjoys were conferred in 1969 (133 v. S262). Prior to that time, creation of county library districts was strictly controlled by R.C. 3375.19 and 3375.20. Both of these sections remain in effect; however, the limitations over creation of county library districts expressed in them appear to have been greatly relaxed by R.C. 3375.01 (E), supra.

R.C. 3375.19 allows creation of a county library district through a resolution adopted by a board of county commissioners and approved by the voters of the proposed district. It provides, in part, as follows:

In each county there may be created a county library district composed of all of the local, exempted village, and city school districts in the county which are not within the territorial boundaries of an existing township, school district, municipal, county district or county free public library, by one of the following methods:

[A resolution authorizing creation of the district, adopted by the county commissioners either on its own initiative, or by petition, is presented to the voters for approval.]

An alternative method for creation of a county library district is found in R.C. 3375.20. It provides:

In any county in which there is not in existence a county library district and in which all of the local, exempted village, and city school districts in the county, in which there is not located a main library of a township, municipal, school district, association, or county free public library, are receiving approved service from one or more of such libraries, there may be created a county library district.

The boards of trustees of the library or libraries providing approved library service to the school districts in the county in which there is not located a main library

of a township, municipal, school district, or county free public library may adopt a resolution requesting the formation of a county library district composed of all of the school districts being served by such library or libraries. Such resolution or resolutions shall set forth the school districts to be included in the proposed county library district and it shall be submitted to the taxing authority of the subdivision or subdivisions having jurisdiction over the library or libraries requesting the formation of such proposed library district.

[If the resolution is approved by the various taxing authorities, the district is created.]

Under either of these sections, formation of the two county districts you describe would not be possible. R.C. 3375.19, the district is to be composed of "all of the local, exempted village, and city school districts" not already within the boundaries of the existing library district enumerated in the statute. As that section contemplates one county district for all such school districts, creation of more than one is in contravention of that section, and could create many obvious problems. For instance, if the resolution is passed in one "county district" and not in the other, the clear purpose of this section to consolidate unserved school districts would be thwarted. As to R.C. 3375.20, it also appears that the section contemplates one consolidated unit to serve the unserved school districts. Moreover, it is clear that the Lane Public Library could not simply convert from a school district library to a county district library since R.C. 3375.20 specifically applies only to school districts in which no main library is located, and you indicate that Lane is a main library for the school district. Thus, formation of two county library districts as described in your request could not be effectuated under R.C. 3375.19 or 3375.20.

Likewise, examination of R.C. 3375.19 and 3375.20 reveals that formation of a county library district would require expansion of the territory supporting the libraries. R.C. 3375.19 demands that the proposed county district include all of the school districts not within the boundaries of an existing library district. Creation of a county district which included only selected districts would circumvent the clear purpose of the statute to consolidate all "unattached" school districts into one library unit. Similar reasoning applies to R.C. 3375.20 as it too contemplates consolidation of the school districts not already the site of a "main library of township, municipal, school district, association, or county free public library."

Although the action proposed by these libraries would not be possible under R.C. 3375.19 or 3375.20, those sections do not bind the State Library Board. R.C. 3375.01 (E), as previously indicated, grants the State Board wide discretion, and if the Board is of the opinion that the best interests of the state library system would be served by creation of two county library districts in Butler County, then it may so act. Moreover, should the Board make a similar determination with respect to the size of such a county district, or districts, then the Board could, under R.C. 3375.01 (E), allow such a resolution to go before the voters. The restriction imposed upon the creation of county library districts under R.C. 3375.19 and 3375.20 apply only to bodies of limited powers. The State Library Board, on the other hand, is free to act under R.C. 3375.01 in any manner necessary to promote a statewide program of development and coordination of library services." 1975 Op. Att'y Gen. No. 75-026.

Accordingly, it is my opinion, and you are so advised that:

1. The State Library Board may, under R.C. 3375.01 (E), approve a resolution which provides for creation of two separate county library districts in the same county if the State Board determines that such action would best promote "a statewide program of development and coordination of library services."

2. The State Library may, under R.C. 3375.01 (E), approve a resolution for creation of a county library district, even though such resolution does not comply with the strict territorial requirements of R.C. 3375.19 or 3375.20, if the State Board determines formation of such a county library district would best promote "a statewide program of development and coordination of library services."

### OPINION NO. 78-021

#### Syllabus:

Boards of township trustees are without authority to retain the services of a traffic consultant.

To: John F. Norton, Geauga County Pros. Atty., Chardon, Ohio  
By: William J. Brown, Attorney General, April 18, 1978

I have before me your request for an opinion on the following question:

Do township trustees have authority to retain the services of a traffic consultant?

Before addressing your specific question, I must point out the long accepted doctrine that boards of township trustees enjoy only such powers as are specifically conferred upon them by the legislature, or which are necessarily implied therefrom. Yorkavitz v. Board of Township Trustees, 166 Ohio St. 346 (1957).

The authority of township trustees to procure the services of consultants is found in R.C. 9.36. That section provides:

The board of county commissioners of any county or the township trustees of any township may contract for the services of fiscal and management consultants to aid it in the execution of its powers and duties.

Although this statutory provision is relatively new (eff. 11-7-75), and the exact meaning of "fiscal and management" consultant is not yet clearly delineated, no reasonable construction of that phrase could include a traffic consultant. I am aware of no other statutory provision which could be said to expressly authorize the retention of such a consultant. Therefore, if authority exists for the retention of a traffic consultant, it must be implied from the duty and authority vested in the boards of township trustees relative to the regulation of traffic.

General authority to regulate the flow of traffic is not specifically granted to boards of township trustees by the Revised Code. The only general police powers over motor vehicles granted to them is found in R.C. 505.17. That section allows trustees to adopt parking regulations. Under R.C. 4511.11, township trustees, as local authorities, are required to "place and maintain traffic control devices in accordance with the department of transportation manual . . ." However, the authority granted to township trustees under this section has been very strictly construed. In 1955 Op. Atty Gen. No. 5437, p. 310, a predecessor reached the following conclusions which respect to R.C. 4511.11:

1. A board of township trustees is included within the term "local authorities" as used in Section 4511.11, Revised Code.

2. Section 4511.11, Revised Code, merely authorizes local authorities, as to roads under their jurisdiction, to place and maintain traffic control devices (1) to guide traffic and (2) to warn highway users of dangerous road condition and of existing traffic regulations. This section does not purport to authorize local authorities to promulgate speed or other traffic regulations.

Thus, under R.C. 4511.11, boards of township trustees serve merely as an administrative body with respect to regulation of traffic, their only powers being limited to the placement and maintenance of traffic control devices.

The only other powers which such boards enjoy as "local authorities" under R.C. Chapter 451 are those set forth in R.C.4511.21 and R.C. 4511.65. R.C. 4511.21 establishes speed limits, and provides in pertinent part as follows:

Whenever local authorities determine upon the basis of an engineering and traffic investigation that the speed permitted by divisions (A) to (K) of this section, on any part of a highway under their jurisdiction is greater than is reasonable and safe under the conditions found to exist at such location, the local authorities may by resolution request the director [of transportation] to determine and declare and reasonable and safe prima facie speed limit.

R.C. 4511.65 deals with through highways and provides, in pertinent part, as follows:

All state routes . . . are hereby designated as through highways, provided that stop signs shall be erected at all intersections with such through highways, by the department of transportation as to highways under its jurisdiction, and by local authorities as to highways under their jurisdiction, except as otherwise provided by this section . . .

The department or local authorities having jurisdiction need not erect stop signs at intersections they find to be so constructed as to permit traffic to safely enter a through highway without coming to a stop . . .

The department with reference to state highways, and local authorities with reference to highways under their jurisdiction, may designate additional through highways and shall erect stop signs in all streets and highways intersecting such highways, . . .

The authority conferred upon boards of township trustees under these sections thus is essentially administrative, with little room given for the exercise of discretion.

Considering the limited statutory authority over traffic which township trustees possess, there is little doubt that their authority to retain a traffic consultant cannot be characterized as necessarily implied. While a consultant makes the trustee's job easier, his services are not absolutely required. In the analogous situation of the authority of county commissioners to hire experts, one court has concluded that no such authority exists even though the experts might allow a more efficient exercise of the commissioners' duties. *Gorman v. Heuck*, 41 Ohio App. 453 (1931). Cf. 1973 Op. Att'y Gen. No. 73-090 (concluding that the authority of township trustees to hire an insurance consultant could not be implied from the authority to purchase insurance.) Thus, I am constrained to conclude that the authority of the township trustees to retain a traffic consultant is not necessarily implied from their limited authority over traffic.

Accordingly, it is my opinion, and you are so advised that boards of township trustees are without authority to retain the services of a traffic consultant.

### OPINION NO. 78-022

#### Syllabus:

R.C. 124.57 does not prohibit a classified civil servant from being appointed to the office of township trustee pursuant to R.C. 503.24, or from seeking that office in a non-partisan election. (1974 Op. Att'y Gen. No. 74-034, approved and followed. 1962 Op. Att'y Gen. No. 2879, p. 213; 1961 Op. Att'y Gen. No. 2310, p. 334; 1960 Op. Att'y Gen. No. 1663 [first branch of the syllabus], p. 597; 1959 Op. Att'y Gen. No. 223 [second branch of the syllabus], p. 110; 1957 Op. Att'y Gen. No. 844, p. 344; and 1951 Op. Att'y Gen. No. 1014, p. 854, overruled.)

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To: David Frey, Athens County Pros. Atty., Athens, Ohio  
By: William J. Brown, Attorney General, April 18, 1978

I have before me your request for my opinion which raises the following question:

Would it be proper for the Board of Township Trustees to appoint an employee of the Department of Mental Health and Mental Retardation to a vacant seat on the Board of Township Trustees?

As you indicate in your request, R.C. 124.57 prohibits classified civil servants from engaging in politics. Although you do not indicate whether the particular employee in question is classified, I will assume for purposes of this opinion that he is classified.

R.C. 124.57 provides that:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions. (Emphasis added.)

This section has been the source of numerous opinions from this office, the most recent being 1974 Op. Att'y Gen. No. 74-034. That opinion concluded:

A person in classified civil service is not prohibited from being a candidate for or holding the office of member of a county board of education by R.C. 124.57, because that Section only prohibits partisan political activity.

The opinion specifically overruled several previous opinions of my predecessors and was based upon two cases which had narrowly construed the phrase "take part in politics." Those two cases, Heidtman v. Shaker Heights, 163 Ohio St. 109 (1955), and Gray v. Toledo, 323 F. Supp. 1281 (N.D. Ohio, 1971), are carefully analyzed in Opinion No. 74-034, *supra*, and I see no need to analyze them again here. In summary, they hold that R.C. 124.57 prohibits a classified civil servant from engaging in partisan politics. It does not prohibit non-partisan political activity and specifically protects freedom of expression and the right to vote.

It was my conclusion in Opinion No. 74-034 that the office of a county school board member was not a partisan office in the sense prohibited by R.C. 124.57. Your opinion request can therefore be reduced to one simple issue: Does appointment to a board of township trustees entail involvement in partisan politics? The answer to that question requires further analysis.

A vacancy on the Board of Township Trustees is filled pursuant to R.C. 503.24. That section provides, in part, as follows:

If, by reason of the nonacceptance, death, or removal of a person chosen to an office in any township at the regular election, or if there is a vacancy from any other cause, the board of township trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.

While it appears that this type of appointive process could involve partisan politics, it should be pointed out that elections for township offices are normally made without primaries, R.C. 3513.253, and on non-partisan ballots, R.C. 3505.04. In that respect, they are identical to elections for school board members. See, R.C. 3513.254 and 3505.04. Under the reasoning of Opinion No. 74-034, it would therefore be permissible for a classified civil servant to run for township trustee, as it is a non-partisan election. Since such an employee could run for the office of trustee, it would be anomalous to conclude that he could not be appointed to fill a vacancy on the board of trustees. Thus, the appointment is permissible.

One caveat is necessary. The rationale supporting Opinion No. 74-034 is that school board members are elected in a non-partisan election, on non-partisan ballots, and without primary elections. Normally, township elections are held in a similar fashion. However R.C. 3513.253 requires that a primary election be held upon petition of a majority of the electors in the township. Where such a primary is held the ensuing general election becomes partisan, with partisan ballots in use and it would be inappropriate for a classified civil servant to seek office in such an election.

Accordingly, it is my opinion, and you are so advised that:

R.C. 124.57 does not prohibit a classified civil servant from being appointed to the office of township trustee pursuant to R.C. 503.24, or from seeking that office in a non-partisan election. (1974 Op. Att'y Gen. No. 74-034, approved and followed. 1962 Op. Att'y Gen. No. 2879, p. 213; 1961 Op. Att'y Gen. No. 2310, p. 334; 1960 Op. Att'y Gen. No. 1663 [first branch of the syllabus], p. 597; 1959

Op. Att'y Gen. No. 223 [second branch of the syllabus], p. 110; 1957 Op. Att'y Gen. No. 884, p. 344; and 1951 Op. Att'y Gen. No. 1014, p. 854, overruled.

### OPINION NO. 78-023

#### Syllabus:

A person who is appointed to complete an unexpired term as county auditor after December 6, 1976 shall receive a salary according to the salary schedule contained in R.C. 325.03 prior to its amendment by 1976 H.B. 784, plus any increase in that salary allocated by Section 4 of the amending act. After the calendar year 1978 all county auditors will receive the salary set out in the amended salary schedule, but in no event will that salary be less than that received during calendar year 1978.

**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**  
**By: William J. Brown, Attorney General, April 21, 1978**

I have before me your request for my opinion regarding the salary of the county auditor. You indicate that the present auditor was appointed to fill an unexpired term. He took office on February 1, 1977. The problem you have encountered stems from 1976 House Bill 784 which amends R.C. 325.03 (effective December 6, 1976). As amended, the statute provides:

Each county auditor shall be classified, for salary purposes, according to the population of the county. All such county auditors shall receive annual compensation in accordance with the following schedule:

#### CLASSIFICATION AND COMPENSATION SCHEDULE

Class	Population Range	Compensation
1	1- 20,000	\$13,000
. . .		
14	1,000,001 and over	\$29,000

Section 4. Notwithstanding the provisions of section 325.03 of the Revised Code as amended by Section 1 of this act, commencing in 1977 the salary paid to a county auditor shall be increased by five percent of the annual salary paid to him as of December 31, 1976 and for each year thereafter until the end of calendar year 1978, by five percent of the preceeding year's annual salary . . . For calendar years after 1978, a county auditor shall be paid in accordance with the salary schedule provided in section 325.03 of the Revised Code as amended by Section 1 of this act, except that no salary of a county auditor shall be less than that received in calendar year 1978.

Therefore, you have raised the following question:

Should the present Auditor of Cuyahoga County be paid according to the schedule set forth in Section 1 of 1976 H.B. 784, or should he be paid at 5% more than the salary of the previous auditor as set forth in Section 4 of the bill?

Before addressing your specific question, some preliminary discussion is required. Art. II, §20 of the Ohio Constitution provides as follows:

The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished. (Emphasis added.)

The prohibition contained in this section applies to county officers, and there is no question that the county auditor's compensation may not be increased during an existing term in office. See, 1960 Op. Att'y Gen. No. 1155, p. 105.

The General Assembly may, however, establish a "sliding scale" salary schedule for officers, and where it is in effect prior to the officer's existing term in office, his salary can vary according to the schedule. See, State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942). 1977 Op. Att'y Gen. No. 77-083. Thus, where the population of a county increases in the middle of an existing term, the salary of the incumbent may increase accordingly. Moreover, under State, ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947), if the general assembly adopts a new pay scale during a term, and a new officer is appointed to fill an unexpired term after the effective date of the amendment, then the appointee is entitled to the newer pay rate since it did not occur during his term in office. Therefore, the county auditor could be paid under the new pay schedule in R.C. 325.03 since he took office after the effective date of the amendment.

As you indicate by your question, Section 4 of 1976 H.B. 784 makes the act ambiguous. Several interpretations are possible. It could be read as allowing all county auditors a five per cent salary increase, regardless of the time they took office. The problem with that interpretation is obvious, however, for it would involve an in-term increase in salary to the auditors which is clearly prohibited by art. II, §20. Under Cooperative Legislative Committee v. Public Utilities Commission, 177 Ohio St. 101 (1964), a construction which renders a statute unconstitutional should, if possible, be avoided. Therefore, other alternatives must be explored.

Another possible interpretation is to read the entire act as giving all auditors taking office after the effective date of the Act a salary as set forth in the new schedule. However, several problems exist under such a construction. First, Section 4 specifically provides that:

For calendar years after 1978, a county auditor shall be paid in accordance with the salary schedule provided in section 325.03 of the Revised Code as amended by Section I of this act, except that no salary of a county auditor shall be less than that received in calendar year 1978.

This portion of Section 4 implies that the salary schedule is not to take effect until after calendar year 1978. Moreover, the first sentence of Section 4, supra, clearly contemplates a five per cent per annum pay increase for county auditors. If the new auditors are to be paid under the amended schedule, that sentence would require a new salary plus five percent. Such a result would conflict with that part of Section 4, quoted above, which provides that auditor's salaries be based on the new schedule after 1978, but "that no salary of a county auditor shall be less than that received in calendar year 1978."

I therefore am inclined to construe Section 4 as postponing the effective date of the salary schedule until the end of calendar year 1978. Under this construction, all county auditors who enter office after December 6, 1976 would receive the salary under the old schedule, plus five per cent in 1977 and five percent more in 1978. When calendar year 1978 ends, all auditors will then switch over to the amended schedule in Section 1. I find support for this construction in the observation that by calendar year 1979 all of the auditors will have commenced a new term in office since county auditors are elected quadrennially in even numbered years. R.C. 319.01. R.C. 3501.02 (C).

Accordingly, it is my opinion and you are so advised that;

A person who is appointed to complete an unexpired term as county auditor after December 6, 1976 shall receive a salary according to the salary schedule contained in R.C. 325.03 prior to its amendment by 1976 H.B. 784, plus any increase in that salary allocated by Section 4 of the amending act. After calendar year 1978 all county auditors will receive the salary set out in the amended salary schedule, but in no event will that salary be less than that received during calendar year 1978.

#### OPINION NO. 78-024

#### Syllabus:

The board of trustees of a state university may, with the concurrence of the attorney general, pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract to an individual who has properly asserted a claim against the university in a forum other than the Court of Claims.

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To: Edward Q. Moulton, Vice Pres., Ohio State University, Columbus, Ohio  
By: William J. Brown, Attorney General, May, 1, 1978

I have before me your request for my opinion which reads as follows:

With increasing frequency, the University and its Board of Trustees find themselves defendants in lawsuits brought in the U.S. District Court or in administrative proceedings before Federal agencies such as EEOC or Department of Labor (Office of Veterans Reemployment Rights). Similarly, the Board may be the respondent in administrative proceedings before State agencies such as the Ohio Civil Rights Commission and State Personnel Board of Review. Sometimes the University or the Board is the only defendant or respondent, but often some ranking University administrators may be joined as codefendants. Occasionally, when confronted with the prospects of extensive preparation for litigation coupled with the uncertainty of the outcome, it becomes economically very attractive to settle the case with the payment of cash in order to obtain dismissal of the action. We seek your advice as to whether and by what procedures the University is able to settle these controversies by lump sum cash settlement and thus minimize its overall expense.

We therefore seek your formal opinion on the following question:

In legal proceedings against the University pending or threatened before state and federal agencies, or in the federal courts, involving matters other than damage claims properly within the jurisdiction of the Court of Claims, is a state university authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract, to a claimant who has a right of action, other than in the Court of Claims, against the university or its board of trustees under either state or federal law.

Because of the nature of the issues raised in your request, I must express at the outset certain limitations regarding the scope of the following analysis. First, I shall assume that in mentioning suits against officers and administrators of the university, you are referring only to those actions in which the university itself may ultimately be held liable for the acts of such individuals.

Second, I shall assume that your inquiry is limited to those claims asserted against the university for which the defense of sovereign immunity is unavailable. It is well settled that state universities are mere agents or instrumentalities of the state and, as such, share in the sovereign immunity of the state. Thacker v. Board of Trustees, 35 Ohio St.2d 49 (1973). Although Ohio Const. art. I, § 16 provides that suits may be brought against the state in such manner as may be provided by law, the provision is not self-executing and it has been held consistently that suits can be brought against the state only in the manner and in accordance with the procedure provided for by the General Assembly. E.g., Wolf v. Ohio State University, 170 Ohio St. 49 (1959); State, ex rel. Williams v. Glander, 148 Ohio St. 188 (1947).

Similar in effect to the judicial doctrine of sovereign immunity is the concept of federal constitutional government embodied in the eleventh amendment. (U.S. Const. Amend. XI) Broadly speaking, operation of the eleventh amendment bars individuals from asserting claims in federal court that seek to impose financial liability upon the state without its consent. Edelman v. Georgia, 415 U.S. 651, 94 S.Ct. 1347 (1974). It should, of course, be noted that the requisite consent has been found to exist under a variety of circumstances. E.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 96 Sup. Ct. 2666 (1976) (the eleventh amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of the fourteenth amendment); Parden v. Terminal Ry. of Alabama, 337 U.S. 184, 84 S. Ct. 1207 (1964) (Waiver of immunity is inferred when state leaves sphere that is exclusively its own and enters into activities subject to congressional regulation.)

A detailed analysis of either sovereign immunity or the eleventh amendment is unnecessary to the disposition of the issues you raise. It is, however, important to realize that the imposition of financial liability upon the state is the prerogative of the state. Under no circumstances does an officer of the state possess the authority to waive the state's immunity from suit and subject it to financial liability of any kind. E.g., Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347 (1945); State, ex rel. Board of County Commissioners v. Rhodes, 177 N.E.2d 557 (1960). In discussing the power of state officers to compromise and settle claims asserted against the state, therefore, I shall assume that such claims are limited to those for which the defense of immunity is unavailable. The payment of money in settlement of a claim would otherwise constitute a waiver of the state's immunity.

A settlement or compromise has been defined as an agreement or arrangement whereby a right or claim disputed in good faith or unliquidated is settled by mutual concessions of the parties. National Labor Relations Board v. Illinois Tool Works, 153 F.2d 811 (1946); In Re Lovel Building Co., Inc., 116 F.Supp. 383 (1953). In Ohio, as in most jurisdictions, settlement agreements have been

characterized as contracts and their interpretation has been governed by contract law. Hageman v. Signal L.P. Gas Inc., 486 F.2d 479 (1973); Diamond v. Davis Bakery, 8 Ohio St.2d 38 (1966); Adams Express Co. v. Beckwith, 100 Ohio St. 348 (1919).

American courts have consistently recognized both the validity and desirability of settlements or compromises in lieu of litigation. See, e.g., Williams v. First National Bank, 216 U.S. 582, 30 S.Ct. 441 (1910); St. Louis Mining and Milling Co. v. Montana Mining Co., 171 U.S. 650, 195 S.Ct. 61 (1898). The courts of Ohio have long concurred in this position. In White v. Brocaw, 14 Ohio St. 339 (1863), the Ohio Supreme Court noted at 346 as follows:

If there is any one thing which the law favors above another it is the prevention of litigation by the compromise and settlement of controversies.

See, also, Spercel v. Sterling Industries, 31 Ohio St.2d 36 (1972); Hawgood v. Hawgood, 33 Ohio Misc. 227 (1975); In Re Paternity, 4 Ohio Misc. 193 (1965); Mesmer v. Johnson, 68 O.L.A. 408 (1954). Thus, the law clearly favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation.

Your inquiry, however, concerns the power of a state university, through its board of trustees, to settle a claim asserted against it. It is appropriate, therefore, to examine briefly the powers of a board of trustees. It is true that the board is vested with broad supervisory powers concerning the government of the university. See, Long v. Board of Trustees, 24 Ohio App. 261 (1956); R.C. 3335.02; R.C. 3335.10. Its powers, however, are not without limits. See, e.g., 1974 Op. Att'y Gen. No. 74-108; 1974 Op. Att'y Gen. No. 74-098. The power to settle a claim asserted against it though the payment of a sum of money is not expressly conferred upon the board of trustees of a state university.

Courts have frequently held, however, that the power of a governmental entity to compromise a disputed claim may be inferred from more general powers. Since a settlement agreement is a contract, the power to compromise and settle a claim has been inferred from the statutory power to contract. It has also been viewed as a corollary of the power to sue and be sued. 17 E. McQuillin, Municipal Corporations § 48.17 et seq. (3rd ed. rev. 1968). In Roop v. Byer, 84 O.L.A. 417 (1959), the court, in concluding that a board of township trustees possessed the power to settle a lawsuit against it, noted at 418 as follows:

At the outset, there is no question of the powers of the Trustees to settle a lawsuit. R.C. 508.01, referring to townships, provides:

It may sue and be sued, plead and be impleaded. The conferring by statute the right of a government to sue or to be sued also confers upon such authority the right when one is sued to compromise and settle said claim. In fact, in such cases, it is the duty of the trustees to use their best judgment and effort to protect the township in such lawsuit.

The Ohio State University is, of course, a body corporate and R.C. 3335.03 specifically empowers its board of trustees to contract and to sue and be sued. It is arguable, therefore, that under the foregoing theory the board possesses the implied power to settle a disputed claim that has been asserted against it.

I am, however, disinclined to so conclude. The power to sue and be sued and the power to contract relate only to the capacity of the university and its board of trustees. Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959). Although the power to contract may well be a prerequisite to any binding contract to which the university is a party, it can scarcely be contended that a board of trustees is thereby authorized to enter into every conceivable type of contract. It has been

held repeatedly that public officers are without authority to bind the government they represent by acts outside their express authority, even though within their apparent power. E.g., Canal Fund v. Perry, 5 Ohio 56 (1831); State v. Lake Shore, 1 Ohio Nisi Prius 292 (1895). More specifically, R.C. 3.12 provides that a state officer or agent may not make binding contracts to pay any sum of money not previously appropriated for the purpose for which such contract is made unless such officer or agent has been duly authorized to make such contract. I must, therefore, conclude that the power of a university board of trustees to sue and be sued and to contract does not in and of itself authorize such board to compromise and settle a claim asserted against the university.

Of much greater significance than the abstract capacity to sue and be sued is the fact that the General Assembly has in a number of instances actually made the university amenable to suit. See, e.g., R.C. 124.34 (provides for administrative review of appointing authority's personnel decisions); R.C. 4112.02 (imposes liability upon the state for violation of civil rights statutes). The General Assembly has, thus, conferred a right of action upon individuals that could result in a money judgment against the university. It is this statutory imposition of liability that, in my opinion, carries with it the implied power to compromise and settle claims properly asserted against the university.

It is well established that public officers, in addition to those powers expressly conferred upon them by statute, possess such implied powers as are necessary for the due and efficient exercise of the power expressly granted. Thus, where an officer or a governing board is directed by the constitution or statute to perform a particular function, in the absence of specific directions covering in detail the manner and method in which it shall be done, the command carries with it the implied power and authority necessary to the performance of the duty imposed. E.g., State, ex rel. Copeland v. State Medical Board, 107 Ohio St. 20 (1923); State, ex rel. Hunt v. Hildebrant, 93 Ohio St. 1 (1915). Certainly affairs of state must be conducted on as equally intelligent lines as private business and if a master commands a servant to do a particular thing, without directing him in detail how he shall do it, it is a fair and necessary presumption that the servant is to exercise an intelligent discretion in doing the thing commanded to be done. State, ex rel. Copeland v. State Medical Board, supra, at 28; State, ex rel. Hunt v. Hildebrant, supra, at 11.

It may be persuasively argued, therefore, that the board of trustees of a state university possesses the implied power to settle a claim that has been properly asserted against it. Although Ohio Const. art. I, § 16 provides that suits may be brought against the state in such courts and in such manner as may be provided by law and the General Assembly has in a number of instances provided for suits against a university, neither the constitution nor pertinent statutes fully and specifically delimit the university's powers with respect to its liability. It is, therefore, quite reasonable to conclude that in the absence of a statutory provision to the contrary, the board of trustees of a state university possesses all the powers properly exercised by those named as a party to a legal proceeding including the power to settle the claim asserted when it is in the best interests of the university to do so.

It must be remembered that the entire civil adjudicative process is primarily designed for the settlement of disputes between parties. Once an instrumentality of the state is, by operation of statute, a proper party to such a dispute, it is reasonable to conclude that it is possessed of the implied power to settle the dispute as economically and expeditiously as possible.

It is, therefore, my opinion that the board of trustees of a state university possesses the implied power to compromise and settle a claim properly asserted against the university.

Having so concluded, I shall now discuss the circumstances under which this authority may be properly exercised.

Once a state university has been named a party to a legal proceeding the powers and duties of its board of trustees cannot be examined in a vacuum. Rather, they must be considered in conjunction with the powers of the attorney general. Unlike the governing board of a private entity, the board of trustees of a state university is not free to unilaterally determine if, and pursuant to what terms, a claim that has been asserted against it may be compromised and settled. R.C. 109.02 designates the attorney general as the chief law officer of the state and all its departments and provides that no state officer, board, or the head of a department or institution shall employ or be represented by other counsel or attorneys at law. The board of a state university, therefore, may exercise such power only with the concurrence of the attorney general.

Although the attorney general is not expressly authorized by statute to dispose of litigation in which the state is involved through the compromise and settlement of a claim, his powers are not limited to those conferred by statute. The attorney general is a constitutional officer of the state. See, Ohio Const. art. III, §2. In addition to the powers conferred upon the attorney general by constitution and statute, he possesses all of the common law powers and duties pertaining to the office, except insofar as they have been expressly limited by statute. The courts of this state have expressly recognized that the attorney general is possessed of these common law powers. State, ex rel. Doerfler v. Price, 101 Ohio St. 50, 57 (1920); Brown v. Newport Concrete Co., Case No. 728338 (Court of Common Pleas, Hamilton County, Ohio, 1974). Aff'd 44 Ohio App.2d 121 (1975); State of Ohio v. BASF Wyandotte Corp., Case No.904571 (Court of Common Pleas, Cuyahoga County, Ohio 1974).

Among the common law powers of the attorney general is the authority to manage and control all litigation in which the state is involved. E.g., Derryberry v. Kerr-McGee Corp., Okl. 516 P.2d 813 (1973); State v. Ehrlick, 65 W.Va. 700, 64 S.E. 64 S.E. 935 (1909). It is unnecessary for the purposes of this opinion either to explore the outer limits of this control or to define it with any specificity. It is sufficient to note that it includes the power to dispose of litigation in which the state is involved through the compromise and settlement of a claim. New York v. New Jersey, 256 U.S. 296, 41 S.Ct. 492 (1921); State, ex rel. Carmichael v. Jones, 252 Ala. 479, 41 So.2d 280 (1949); People, ex el. Stead v. Spring Lake Drainage and Levee District, 253 Ill. 479, 97 N.E. 1042 (1912).

In so noting, I am fully aware that the case law on this point has generally dealt with claims of the state. I am, however, unable to discern any basis for distinguishing between claims of the state and claims asserted against it. To the contrary, it would be highly anomalous were such claims to be treated differently. The attorney general normally possesses a great deal of discretion in determining whether to institute legal proceedings and when to conclude them. State, ex rel. Peterson v. Fraser, 191 Minn. 427, 254 N.W. 776 (1934); State v. Finch, 128 Kan. 765 (1929). Such discretion in the prosecution of a case is wholly inconsistent with a position that would require legal counsel in the defense of a case to proceed, categorically with full litigation.

I am also aware that the General Assembly has in a number of instances specifically authorized the attorney general to settle claims of or against the state. See, R.C. 115.17 (attorney general and auditor are authorized to adjust any claim of the state in an equitable manner); R.C. 5733.25 (attorney general may, with the advice and consent of the tax commissioner, compromise or settle any claim for taxes); R.C. 2743.15 (agency may with the approval of the attorney general and Court of Claims settle or compromise any civil action against the state in the Court of Claims). Operation of the rule of expressio unius est exclusio alterius arguably compels the inference that the attorney general lacks the power in all instances other than those set forth by statute, to approve the compromise and settlement of a claim asserted against the state.

The argument, however, is not particularly persuasive. The rule that compels this inference is, after all, one of statutory construction. In discussing the power of the attorney general to approve the compromise and settlement of a claim against the state, one is not concerned with construing statutory powers but with

delineating common law powers. As indicated previously, the operative question in such a context is not what is permitted by statute but what is expressly prohibited. No Ohio court has ever advanced the proposition that the codification of certain common law powers permits one to infer that all other common law powers are thereby abrogated. To the contrary, courts have consistently held that the common law cannot be repealed by implication. See, In Re McWilson's Estate, 155 Ohio St. 261 (1951); State, ex rel. Morris v. Sullivan, 87 Ohio St. 79 (1909).

Finally, it is necessary to consider the impact of State, ex rel. Board of County Commissioners v. Rhodes, 177 N.E.2d 557 (1960) upon the question of the attorney general's common law powers in this respect. In concluding that the state lacked authority to pay money to a county in settlement of a claim asserted against it, the court noted at 566 as follows:

. . . [I]n our opinion the attorney general would have no authority to agree to payment by the state to the county . . .

(R.C. 115.17) further provides that the 'attorney general and auditor of state may adjust any claim in such manner as is equitable.' In this respect, note first, that such adjustment requires action by both the attorney general and the auditor. Note second, that this statute is limited to adjustment of claims in favor of the state but does not contain any provision authorizing them or either of them to recognize and effectuate payment of claims against the state.

The foregoing case involved an action initiated by the Board of County Commissioners of Mahoning County to recover money damages allegedly overpaid by the county to the state for the support of inmates committed to institutions for the feebleminded. As one of the several grounds offered in support of its claim, the board of county commissioners relied on a prior agreement with the attorney general that the state would adjust the claim of Mahoning County on terms identical to those arrived at through a pending suit on the same issue involving Franklin County.

The case is different in two salient respects from the type of situation considered in the present analysis. First, the claim was one against the state without authorization therefor. In such a situation a settlement would, in effect, waive the immunity of the state. As indicated previously, no public official is possessed of the power to effect such a waiver. Second, at the time that the agreement was executed by the attorney general, there was no pending or threatened litigation of the claim involving Mahoning County. Thus, the common law powers of the attorney general regarding the control of litigation were not at issue before the court. The issue that prompted the court's comments quoted above was whether R.C. 115.17 authorizes the attorney general to settle claims against the state and it clearly does not. It is my opinion therefore, that the decision in State, ex rel. Board of County Commissioners v. Rhodes, supra, has no bearing upon the issue at hand.

Thus, it is clear that the attorney general's power to control and manage all litigation in which the state is involved includes the power to dispose of litigation through the compromise and settlement of a claim asserted against the state. Consequently, the board of trustees of a state university may settle a claim asserted against the university only with the concurrence of the attorney general.

In discussing the circumstances under which the board of trustees may properly exercise its power to settle a claim against the university, it is also necessary to consider the nature of the claim. Your request makes reference to threatened as well as pending legal proceedings against the university. I assume that by this reference you intend to distinguish between a legal proceeding in which no formal action has been taken by the complaining party and one in which a formal complaint has been filed with an adjudicatory agency or court. This distinction is not without significance.

As I indicated at the outset, a claim that seeks to impose financial liability upon the state can be maintained only with the consent of the state. The claim may be asserted only in the forum and in accordance with the procedure provided for by law. If the claimant fails to comply with the designated procedure, the state remains immune from suit. The mere suggestion of a claim against the state does not empower the officers thereof to enter into a settlement agreement. It is not until a claim has been formally filed and is currently pending in the appropriate forum that the board of trustees possesses the authority to compromise and settle such claim.

Finally, you have raised a question concerning the proper form of a settlement agreement. More specifically, you inquire whether a state university is authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract.

Except as provided by a local statute or rule of court, no particular form is required to enact a valid compromise agreement. Main Line Theatres v. Paramount Film Distrib. Corp., 298 F.2d 801 (3rd Cir., 1962) cert denied 370 U.S. 939, 82 S.Ct. 1585 (1962). Oral agreements voluntarily entered into by the parties in the presence of the court stand on equal footing with written agreements signed by the parties. See, Spercel v. Sterling Industries, 31 Ohio St.2d 36 (1972). Judicial approval is not required to make a binding settlement agreement. A settlement agreement voluntarily entered into by the parties will be summarily enforced by the court. Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721 (7th Cir. 1962) cited in Spercel, supra at 39. Thus, a state university is authorized to pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract.

In conclusion, it is my opinion and you are hereby advised that

The board of trustees of a state university may, with the concurrence of the attorney general, pay a cash settlement pursuant to either a journalized entry or a nonjudicially approved contract to an individual who has properly asserted a claim against the university in a forum other than the Court of Claims.

#### OPINION NO. 78-025

##### Syllabus:

A regional water and sewer district, established pursuant to R.C. Chapter 6119, possesses the power, necessarily implied from R.C. 6119.12, to retain the auditing services of a certified public accounting firm for the purpose of enabling such district to sell its bonds and notes. (Paragraph 1 of the syllabus of 1977 Op. Att'y Gen. No. 77-068 modified).

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**To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio**  
**By: William J. Brown, Attorney General, May 4, 1978**

I have before me your request for my opinion in which you ask whether a regional water and sewer district possesses the authority to retain the auditing services of an independent public accounting firm, particularly to provide certified financial statements, to enable such district's notes and bonds to be publicly marketed.

Regional water and sewer districts may be created pursuant to R.C. Chapter 6119. Such districts are governed by a board of trustees, R.C. 6119.07. The board

may, pursuant to R.C. 6119.12, issue water resource revenue bonds and notes at such times and in such amounts as it deems necessary for the purpose of paying costs resulting from the water resource projects of the district. It is my understanding that it is necessary, in the process of marketing such bonds and notes, to provide certified financial statements prepared by certified public accountants as part of a district's official financial statements to prospective purchasers.

As I stated in 1977 Op. Att'y Gen. No. 77-068, a regional water and sewer district is a creature of statute. Accordingly, it may only perform such acts as are expressly permitted by statute or necessarily implied therefrom. State, ex rel. v. Pierce, 96 Ohio St. 44, 47 (1916). In Op. No. 77-068, it was determined that such a district did not possess such express or necessarily implied authority to obtain the auditing services of a public accounting firm. The facts as presented in your opinion request however, were not before me at the time that opinion was issued. Upon consideration of these additional facts, it is apparent that the auditing services of certified public accountants are required by regional water and sewer districts to insure that its bonds and notes are marketable. Accordingly, the power to retain such services is a power necessarily inferred from the power to issue bonds and notes.

It is therefore my opinion, and you are so advised, that a regional water and sewer district, established pursuant to R.C. Chapter 6119, possesses the power, necessarily implied from R.C. 6119.12, to retain the auditing services of a certified public accounting firm for the purpose of enabling such district to sell its bonds and notes. (Paragraph 1 of the syllabus of 1977 Op. Att'y Gen. No. 77-068 modified).

#### OPINION NO. 78-026

##### Syllabus:

R.C. 120.39 prohibits a village solicitor (appointed pursuant to R.C. 733.48) and members of his office, his partners, and his employees from being appointed as counsel to represent an indigent criminal defendant under R.C. Chapter 120.

**To: Lowell S. Peterson, Ottawa County Pros. Atty., Port Clinton, Ohio**  
**By: William J. Brown, Attorney General, May 4, 1978**

I have before me your request for my opinion which raises the following questions:

1. May an attorney who is employed as legal counsel by a village under Section 733.48 O.R.C., accept appointment by a Court (Municipal or Common Pleas) of Ottawa County, Ohio, as legal counsel for indigent defendants in criminal cases where he is paid out of county funds or state funds for fees set by the appointing court?
2. May an attorney who is employed by or a member of a firm of an attorney who is employed as legal counsel of a village under Section 733.48 O.R.C., accept appointment by a Court (Municipal or Common Pleas) of Ottawa County, Ohio, as legal counsel for indigent defendants in criminal cases where he is paid out of county funds or state funds for fees set by the appointing court?

R.C. 733.48 provides

When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel.

According to the information you have supplied, the village solicitors appointed under this section perform the following duties.

1. Attend council meetings.
2. Handle routine affairs and contracts of the village.
3. Prosecute civil claims in courts or administrative agencies.
4. Handle bond issues.
5. Act as prosecutor of ordinance cases in municipal courts in whose territorial jurisdiction the village is situated.

As you indicate in your request, appointing village solicitors, or their professional associates, to represent indigent criminal defendants under R.C. Chapter 120 may be violative of R.C. 120.39(A). That section provides:

Counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender, and any public defender, county public defender, or joint county defender, or member of their offices, shall not be a partner nor employee of any prosecuting attorney nor of any city solicitor, city attorney, director of law, or similar officer. (Emphasis added.)

Under this section, it appears that the correct answer to your question depends upon whether or not a village solicitor is a "similar officer."

The obvious purpose of R.C. Chapter 120 is to insure that indigents throughout the state are afforded adequate counsel. To this end the chapter provides for state reimbursement of fifty percent of the cost of each county's public defender system. R.C. 120.18(A). Standards are set by the Ohio Public Defender Commission. R.C. 120.01, R.C. 120.03. One of the programs through which a county may qualify for state reimbursement is a court appointment system under R.C. 120.33. It is my understanding that this is the type of program established in your county. The only statutory restriction on the operation of the county program is that set forth in R.C. 120.39(A), supra. The apparent purpose of R.C. 120.39(A) is to avoid the problems inherent in having attorneys switching from defense to prosecution within the county.

In order to determine whether the office of village solicitor is an office that is "similar" to the office of "city solicitor, city attorney, [or] director of law," the statutory functions of each must be compared. The statutory office of city law director is established by R.C. 733.49. That section requires that the city law director be an elector of the city, and shall be elected for a term of four years. Among the duties of the office set forth in R.C. 733.51 is that the city law director "shall be prosecuting attorney of the mayor's court." Under R.C. 733.48, supra, the prosecutorial function of the village solicitor is not at all clear. The only indication of the village solicitor's function set forth in that section is that the solicitor "provide legal counsel for the village." But just as the city attorney must prosecute all cases in mayor's court under R.C. 733.51, the village solicitor must

prosecute them in a village mayor's court. Moreover, under R.C. 1901.34, the city law director and village solicitor share identical prosecutorial duties with respect to state violations occurring within their own municipality. R.C. 1901.34, as amended by 1977 H.B. 312 (effective 1-1-78) provides:

The village solicitor or city law director for each municipal corporation within the territory shall prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is solicitor or law director, or for violations of state statutes or other criminal offenses occurring within the municipal corporation for which he is solicitor or director of law . . .

(Emphasis added.)

Cf. 1968 Op. Att'y Gen. No. 68-117. Thus, at least with respect to the prosecution of ordinance violations and state misdemeanors, the function of the village solicitor is similar, indeed identical, to the function of the city law director. There is, however, another factor to be considered.

Under Art. XVIII, §3, Ohio Const., municipalities have "powers of local self-government." Among those home-rule powers is the power to adopt a charter which establishes a form of government other than that prescribed by statute. Switzer v. State, ex rel. Silvey, 103 Ohio St. 306 (1921). In adopting a charter, the municipality may create offices with functions and titles which differ from those set forth in R.C. Chapter 733. It could be that when R.C. 120.39(A) refers to "any city solicitor, city attorney, director of law, or similar office," it is merely acknowledging the fact that a chartered city would establish an office which has a function similar to the enumerated offices, but an office which has a different title.

In resolving this question, as in all cases of statutory interpretation, the primary objective is to determine the intent of the legislature. Carter v. Youngstown, 146 Ohio St. 203 (1946). As stated, supra, the apparent purpose of R.C. 120.39 is to avoid problems that might arise when a lawyer represents both the state and defendants in original prosecutions. In that respect there appears to be no logical reason to differentiate between city law directors and village solicitors. Both have the duty to prosecute violations of state statutes. Since R.C. 120.39 prohibits a city law director from representing any indigent defendants, it would be anomalous to conclude that no such prohibition applies to village solicitors although they have the same duties. While it could be argued that a village solicitor is not an "officer," but rather an independent contractor under R.C. 733.48, supra, I am inclined to view the argument as myopic. The purpose of R.C. 120.39 is to prevent problems that may occur where attorneys represent both the state and indigent defendants and are paid for both functions with public funds. It is the duties of the job rather than the title which should control.

Accordingly, it is my opinion and you are hereby advised that:

R.C. 120.39 prohibits a village solicitor (appointed pursuant to R.C. 733.48) and members of his office, his partners, and his employees from being appointed as counsel to represent an indigent criminal defendant under R.C. Chapter 120.

**OPINION NO. 78-027****Syllabus:**

The authority to purchase, lease and hold title to motor vehicles to be used to meet the transportation needs of a county board of mental retardation lies with such board and not with the board of county commissioners. (1970 Op. Att'y Gen. No. 70-121 overruled.)

**To: William Safranek, Morgan County Pros. Atty., McConnellsville, Ohio**  
**By: William J. Brown, Attorney General, May 4, 1978**

I have before me your request for my opinion which can be restated as follows:

Does the power to lease, to purchase and to hold title to motor vehicles to be used to meet the transportation needs of a county board of mental retardation lie with the board of county commissioners or with the county board of mental retardation?

R.C. 5126.01 establishes county boards of mental retardation in each county of Ohio. The powers and duties of such boards are set forth in R.C. 5126.03 which reads, in part, as follows:

The county board of mental retardation, subject to the rules and standards of the chief of the division of mental retardation and developmental disabilities shall:

(A) Administer and supervise facilities, programs, and services established under section 5126.06 of the Revised Code and exercise such powers and duties as prescribed by the chief; . . .

(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

(D) Provide such funds as are necessary for the operation of facilities, programs, and services established under section 5126.06 of the Revised Code.

R.C. 5126.06 establishes training centers and workshops for the mentally retarded and provides, in part, as follows:

The chief of the division of mental retardation and developmental disabilities, with the approval of the director of mental health and mental retardation, shall establish in any county or mental health and mental retardation district a training center or workshop, residential center, and other programs and services for the special training of mentally retarded persons, who are determined by the division of mental retardation and developmental disabilities to be capable of profiting by specialized training. . . . The chief is the final authority in determining the nature and degree of mental retardation. He shall decide all questions relative or incident to the establishment and operation of each training center or workshop, residential center, and other program or service; determine what constitutes special training; promulgate subject to sections 119.01 to 119.13 of the Revised Code, all rules governing the approval of mentally retarded persons for

such training; determine or approve all forms used in the operation of programs undertaken under this section; and approve the current operating costs of such programs.

Consequently, the duty and authority to provide facilities, programs and services to the mentally retarded has been reposed in the county boards of mental retardation, subject to the rules and standards developed by the chief of the division of mental retardation and developmental disabilities. While the board of county commissioners serves as the taxing authority for a county board of mental retardation under R.C. 126.03, the commissioners exercise no supervisory power or control over the programs, facilities and general operations of the county board of mental retardation.

One of my predecessors, in 1970 Op. Att'y Gen. No. 70-121 concluded that a county board of mental retardation does not have the authority to acquire school buses for the transportation of mentally retarded pupils. The analysis set forth in that Opinion, however, focused upon a provision of R.C. 307.41, since amended, which authorized a board of county commissioners to purchase vehicles for all county departments unless specifically excepted by statute. The General Assembly subsequently amended R.C. 307.41 (134 Laws of Ohio H. 46, eff. 1971), altering that provision. The current version of R.C. 307.41 provides as follows:

Whenever the board of county commissioners deems it necessary to purchase or lease motor vehicles for its use, or for the use of any department, commission, board, office, or agency under its direct supervision, or for the use of any elected county official or his employees, it shall adopt a resolution setting forth the necessity for such purchase or lease, together with a statement of the kind and number of vehicles required and the estimated cost of purchasing or leasing each. Upon adoption of the resolution the board may purchase or lease such vehicles, subject to sections 307.86 to 307.93 of the Revised Code. (Emphasis added.)

Because a county board of commissioners exercises no control or supervisory power over the county board of mental retardation, the current version of R.C. 307.41 does not require purchase by the commissioners of motor vehicles for the transportation of retarded pupils. For this reason, I am constrained to disagree with my predecessor's conclusion that the purchase of such vehicles is a matter statutorily committed to the board of county commissioners.

R.C. 5126.03(C), supra places an affirmative duty on the boards of mental retardation to furnish transportation that is necessary for those participating in their programs. In 1973 Op. Att'y Gen. No. 73-014, I concluded that these boards have a duty to provide mentally retarded persons with free transportation to and from the facilities operated by such boards within their respective counties. The authority to purchase or lease motor vehicles is so integrally related to the duty to provide transportation that it is a necessarily implied power under R.C. 5126.03(C). It would be incongruous to hold these boards to a duty to provide transportation while withholding the authority to obtain the means of transportation.

Therefore, in specific answer to your question, it is my opinion and you are so advised that the authority to purchase, lease and hold title to motor vehicles to be used to meet the transportation needs of a county board of mental retardation lies with such board and not with the board of county commissioners. (1970 Op. Att'y Gen. No. 70-121 overruled.)

**OPINION NO. 78-028****Syllabus:**

Facsimile signature may appear on applications for certificates of title and odometer statements, pursuant to R.C. 4505.06. Such a facsimile signature may not, however, be employed by a person other than the person whose signature a facsimile signature purports to represent.

**To: Dean L. Dollison, Registrar, Bureau of Motor Vehicles, Columbus, Ohio**  
**By: William J. Brown, Attorney General, May 4, 1978**

I have before me your request for my opinion in which you ask whether or not facsimile signatures may appear on applications for certificates of title and odometer statements pursuant to R.C. 4505.06. It is my understanding that some banks have contemplated allowing employees to use a signature stamp of an officer, authorized to swear on behalf of the bank involved, in order to place the signature upon the application for title, which would then be notarized.

R.C. 4505.06 provides that "[a]pplication for a certificate of title shall be made upon a form provided in section 4505.07 of the Revised Code, and shall be sworn to before a notary public or other officer empowered to issue oaths." The form contained in R.C. 4505.07 for an application for a certificate of title requires that such application be sworn and subscribed to by the applicant before a notary public. A subscription is the act of affixing one's signature to a written document. Black Law Dictionary (4th ed., 1968). Accordingly, it is first necessary to determine if a facsimile signature is a signature for the purpose of R.C. Chapter 4505.

"Signature" or "signed" is not defined in R.C. Chapter 4505. However, in R.C. 1301.01 (MM), "signed" is defined for the purpose of the Uniform Commercial Code as ". . . any symbol executed or adopted by a party with the present intention to authenticate a writing." In Smith v. Greenville County, 199 S.E. 416, 419 (S.C., 1938), the South Carolina Supreme Court commented that a "signature" may be written by hand, printed, stamped, typewritten or cut from one instrument and attached to another. Moreover, in Griffith v. Bonawitz, 103 N.W. 327, 329 (Neb., 1905), it was observed that ". . . whatever mark, symbol, or device one may choose to employ as a representative of himself is sufficient" as a signature. Accordingly, I am persuaded that a "signature" for the purpose of R.C. 4505.06 and 4505.07 includes a facsimile signature.

However, it must be noted that a facsimile signature cannot be employed by a person other than the person whose signature a facsimile signature purports to represent. R.C. 4505.06 requires that an applicant for a certificate of title shall make application on a form prescribed by R.C. 4505.07 which ". . . shall be sworn to before a notary public or other officer empowered to administer oaths." Necessarily, the person employing the facsimile signature in lieu of a handwritten one must be present before the notary or other officer to be sworn and to subscribe the document. Such duty cannot be delegated to another by the expedient of supplying another with an applicant's facsimile signature device.

Therefore, it is my opinion, and you are so advised, that facsimile signature may appear on applications for certificates of title and odometer statements, pursuant to R.C. 4505.06. Such a facsimile signature may not, however, be employed by a person other than the person whose signature a facsimile signature purports to represent.

**OPINION NO. 78-029****Syllabus:**

1. A board of county commissioners must pay premiums for family group medical insurance for the employees of a county mental health and mental retardation board to the extent that the executive director has authorized such payments pursuant to R.C. 340.04(E).
2. A board of county commissioners must pay family group medical insurance premiums on behalf of employees of a county officer who has authorized such payments pursuant to his power to fix the compensation of his employees.
3. The cost of procuring family group medical insurance for county employees may be charged, pursuant to R.C. 305.171, to any fund or budget from which said employees are compensated for their services. 1968 Op. Atty Gen. No. 88-140 overruled.

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**To: Ronald W. Vettel, Ashtabula County Pros. Atty., Jefferson, Ohio**  
**By: William J. Brown, Attorney General, May 4, 1978**

I have before me your request for my opinion on the following two questions:

1. May a Board of Commissioners pay the monthly premium for family group medical insurance for the employees of a community mental health and retardation board, and the employees of the County Engineer's Office, when the Board of County Commissioners does not pay similar benefits for any other county employees?
2. Do county governmental department heads have the authority by virtue of R.C. 325.17 of the Revised Code to require a county board of commissioners to pay premiums for family group medical insurance from funds under their control by virtue of their authority to fix the compensation of their employees?

An issue common to both of your questions is the proper characterization of medical insurance premium payments. This issue was addressed by the Ohio Supreme Court in State, ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389 (1976) and in Madden v. Bower, 20 Ohio St. 2d 135 (1969). In Madden, supra, the Court discussed the proper characterization of employee insurance benefits at 137 as follows:

At the outset, we are compelled to the conclusion that, as to each employee receiving the right to the benefits of the insurance, the premium is a part of the cost of public service performed by such employee.

The purpose of an employer, whether public or private, in extending "fringe benefits" to an employee

is to induce that employee to continue his current employment.

In Parsons, supra, the Court held that insurance premium payments made on the behalf of county office holders constituted compensation within the meaning of Ohio Const. Art. II, §20 and therefore such payments could not be initiated after the commencement of the term for which a county official was elected or appointed. The Court set forth the rationale for this conclusion at 391 as follows:

Fringe benefits, such as [insurance premium payments], are valuable perquisites of an office, and are as much a part of the compensation of office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for fringe benefits may not constitute "salary", in the strictest sense of that word, but they are compensation.

Since insurance premium payments are a form of compensation, authorization for such payments may be made by the officer or board with the statutory power to fix the employees' compensation. 1975 Op. Atty Gen. No. 75-084. See also, 1977 Op. Atty Gen. No. 77-048; 1976 Op. Atty Gen. No. 76-004, 1975 Op. Atty Gen. No. 75-014; 1969 Op. Atty Gen. No. 69-045.

While under the terms of R.C. 340.01, the boundaries of a single county mental health and retardation district are contiguous with those of the county it serves, the district is an entity separate and distinct from the county. Consequently, the employees of the district serve it rather than the county. See e.g., 1974 Op. Atty Gen. No. 74-015; 1975 Op. Atty Gen. No. 75-034; 1975 Op. Atty Gen. No. 75-084; 1976 Op. Atty Gen. No. 76-004. The executive director of a community mental health and retardation board is expressly empowered, pursuant to R.C. 340.04(E), to employ such employees and consultants as may be necessary for the work of the board and to fix their compensation within the limits set by the salary schedule and the budget approved by the board. A board of county commissioners exercises no authority in fixing the compensation of employees of a board of mental health and mental retardation.

The hiring and compensation of employees of county office holders is, however, governed by R.C. 325.17, which provides in pertinent part as follows:

The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor. Such compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. When so fixed, the compensation of each such [employee] shall be paid biweekly from the county treasury, upon the warrant of the auditor.

The officers mentioned in R.C. 325.27 are the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer and county recorder. Under the express terms of R.C. 325.17, a board of county commissioners may limit the aggregate amount which may be expended for compensation of deputies, assistants, clerks and other employees of the officers enumerated in R.C. 325.27. A board of county commissioners, however, has no authority to fix the number or compensation of such employees. 1926 Op. Atty Gen. No. 3429, p. 253; 1927 Op. Atty Gen. No. 1339, p. 2432. Moreover, as

discussed in 1941 Op. Att'y Gen. No. 3600, county commissioners are not authorized to interfere with or limit the county officers enumerated in R.C. 325.17 in the appointment and compensation of such employees.

It is my opinion that the executive director of a community mental health and retardation board is empowered to authorize the payment of medical insurance premiums on behalf of board employees. Moreover, it is my opinion that the county office holders enumerated in R.C. 325.27 are, under the terms of R.C. 325.17, empowered to authorize similar payments on behalf of their employees. The payment of such premiums is not conditioned upon the concurrent action of the board of county commissioners granting similar benefits to other county employees. The total compensation paid to or on behalf of the employees, including salary, insurance premiums and other fringe benefits, may not, however, exceed the limits set forth in the appropriate budgets adopted by the community mental health and retardation board or the board of county commissioners for the various county offices.

Your second question also seeks clarification of the appropriateness of charging the payments of insurance premiums against special funds under the control of the county office holder.

In 1968 Op. Att'y Gen. No. 68-140, one of my predecessors concluded that the board of county commissioners had no authority to charge the cost of group medical insurance procured under the authority of R.C. 305.171 against any fund other than the general fund. This conclusion was based in part on the premise that, while the board of county commissioners had the authority to pay insurance premiums for county employees, the various county office holders had no such authority. This premise is, however, no longer correct in light of the Ohio Supreme Court holding that insurance premium payments are a form of compensation. As I indicated above, county officers who are statutorily empowered to fix the compensation of their employees may also authorize the payment of insurance premiums for such employees.

The conclusion in Opinion No. 68-140, *supra*, was also premised on the lack of statutory authority enabling the county commissioners to charge any part of the cost of employee fringe benefits to special tax levy funds or other appropriations. R.C. 305.171, which authorizes the procurement of group insurance for county employees, was, however, expressly amended in 1969 to provide for the payment of the costs of group insurance "from the funds or budgets from which [county] officers or employees are compensated for services."

Thus, it is my opinion that 1968 Op. Att'y Gen. No. 68-140 must be overruled. County officers who are statutorily empowered to fix the compensation of their employees may authorize the payment of insurance premiums for their employees and such payments may be charged to any fund or budget from which such employees are compensated.

In response to your specific questions, it is, therefore, my opinion and you are so advised that:

1. A board of county commissioners must pay premiums for family group medical insurance for the employees of a county mental health and mental retardation board to the extent that the executive director has authorized such payments pursuant to R.C. 340.04(E).
2. A board of county commissioners must pay family group medical insurance premiums on behalf of employees of a county officer who has authorized such payments pursuant to his power to fix the compensation of his employees.
3. The cost of procuring family group medical

insurance for county employees may be charged, pursuant to R.C. 305.171, to any fund or budget from which said employees are compensated for their services. 1968 Op. Atty Gen. No. 68-140 overruled.

### OPINION NO. 78-030

#### Syllabus:

The Director of Transportation may establish rules, pursuant to R.C. 5501.02, which require that counties apply for a permit, similar to that required of an "individual, firm or corporation" under R.C. 5515.01, before occupying a state highway.

**To: Anthony L. Gretick, Williams County Pros. Atty., Bryan, Ohio**  
**By: William J. Brown, Attorney General, May 8, 1978**

I have before me your request for an opinion on the following question:

Is a county contained in the definition of "any individual, firm, or corporation" as such terms are used in Section 5515.01 of the Ohio Revised Code?

R.C. 5515.01 provides, in pertinent part, as follows:

The director of transportation may upon formal application being made to him, grant a permit to any individual, firm, or corporation to use or occupy such portion of a road or highway on the state highway system as will not incommode the traveling public.

According to information which you have supplied, it is my understanding that until very recently when counties needed to occupy a state highway the engineer simply notified the Department of Transportation, and then proceeded with the project. Currently, the Department of Transportation requires that counties apply for a permit prior to commencement of any project requiring occupation of a state highway. By way of explanation, you indicate that in Williams County, as in most of northwest Ohio, the vast majority of these projects involve the construction or repair of drainage ditches, culverts, and other watercourses.

Addressing your specific question, courts in Ohio have consistently found that a county is neither a "legal person," Summers v. Hamilton County, 7 Ohio N.P. 542 (1900), nor a "corporation," Portage County v. Gates, 83 Ohio St. 19 (1910). Rather, a county is considered a subdivision of the state, with only such powers and privileges as are directly conferred by statute. Hunter v. Mercer County, 10 Ohio St. 515 (1860). The single exception to this extremely narrow view of the status of a county is found in Carder v. Fayette County, 16 Ohio St. 353 (1865), which held that a county was a "person" for purposes of a statute which permitted devise of realty to "any person." However, the proper resolution of your problem does not depend upon the legal status of a county, but rather upon the relation of counties and the Department of Transportation as set forth in R.C. Title 55.

R.C. 5501.11 (D) and R.C. 5501.31 appear to be most relevant. R.C. 5501.11 (D) provides, in pertinent part, that:

The functions of the department of transportation with respect to highways shall be:

. . .

(D) To cooperate with the counties, municipal corporations, townships, and other subdivisions of the state in the establishment, construction, reconstruction, maintenance, repair, and improvement of the public roads and bridges.

R.C. 5501.31 provides:

The director of transportation shall have general supervision of all roads comprising the state highway system. He may alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system, and, in connection therewith, relocate, alter, widen, deepen, clean out, or straighten the channel of any watercourse as he deems necessary, and purchase or appropriate property for the disposal of surplus materials or borrow pits, and, where an established road has been relocated, establish, construct, and maintain such connecting roads between the old and new location as will provide reasonable access thereto.

The director, in the maintenance or repair of state highway, shall not be limited to the use of the materials with which such highways, including the bridges and culverts thereon, were originally constructed, but may use any material which is proper or suitable. The director may aid the board of county commissioners in establishing, creating, and repairing suitable systems of drainage for all highways within its jurisdiction or control and advise with it as to the establishment, construction, improvement, maintenance and repair of such highways. (Emphasis added.)

It is clear from these sections that the Director of Transportation has broad supervisory authority over all roads comprising the state highway system. Any work involving the system must necessarily be approved by the director, including work undertaken by the counties. Under R.C. 5501.02, the Director of Transportation may prescribe rules for the exercise of his lawful authority over the system. If the Director chooses to require that counties file an application for a permit to occupy a state highway, it appears that he is within his statutory powers. In fact, his duty to supervise all roads in the state highway system would seem to require that he establish a system which would keep him apprised of all occupation of such system.

In conclusion, the Director of Transportation has broad supervisory duties with respect to the state highway system, and he may, in the exercise of that responsibility, establish rules for the use of the system which are not in conflict with statute. As there is no general and unrestricted grant to occupy state highway given to counties, the Director may require counties to apply for a permit prior to such occupation. Therefore, it is irrelevant whether a county is an "individual, firm, or corporation" under R.C. 5515.01.

Accordingly, it is my opinion that:

The Director of Transportation may establish rules, pursuant to R.C. 5501.02, which require that counties apply for a permit, similar to that required of an "individual, firm or corporation" under R.C. 5515.01, before occupying a state highway.

**OPINION NO. 78-031****Syllabus:**

1. A township police trainee who receives no compensation for his services, who has no regular duty schedule, and who is not a "regular member of a lawfully constituted police force," is not an "employee" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).
2. A township police trainee who does not qualify as an "employee" under R.C. 4123.01 (A) (1) may nonetheless be covered by the Worker's Compensation system if the township enters into a special contract for such coverage under R.C. 4123.03.
3. Members of a township zoning commission appointed by a board of township trustees under R.C. 519.04, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
4. Members of a township board of zoning appeals, appointed by the board of township trustees pursuant to R.C. 519.13, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
5. Where a board of township trustees creates an advisory panel known as a township planning commission, and the formation of such a commission is not authorized by statute, and the members of that commission receive no compensation, then the members are not "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1). Coverage for such members may not be obtained by contract under R.C. 4123.03 since the township would not be authorized to expend funds for such a purpose.

**To: Stephan M. Gabalac, Summit County Pros. Atty., Akron, Ohio**  
**By: William J. Brown, Attorney General, May 9, 1978**

I have before me your request for my opinion which reads, in part, as follows:

A township police district has appointed an individual as an auxiliary officer. Such person receives no salary. Until such time as the individual completes certain specified law enforcement training he remains in such status. Upon successful completion of the required training, he will be appointed a regular officer and will receive a salary. During the period of his auxiliary training, it is desired that he accompany township police officers on routine patrol in order to assist in his familiarization with police duties and his assimilation into the township police force. Is such individual, while

serving in such auxiliary status, covered by Worker's Compensation, Revised Code chapter 4123, for an injury which might befall him while so accompanying regular members of the township police force in the performance of their duties? If such individual is not covered, may the township contract with the Bureau of Worker's Compensation for coverage pursuant to Revised Code section 4123.03?

A second question for resolution is as follows: Are members of a township zoning commission and board of zoning appeals, appointed pursuant to Revised Code sections 519.04 and 519.13, respectively, "persons in the service of the state," as provided in Revised Code section 4123.01 (A) (1), and, therefore, covered by Worker's Compensation? If they are not, may the township contract with the Bureau of Worker's Compensation for such coverage pursuant to Revised Code section 4123.03?

Your opinion is also requested regarding the following question: A township board of trustees has appointed an advisory body known as a planning commission. Such body is distinct and separate from the aforementioned township zoning commission. No statutory authority exists for the creation of such an advisory commission. The members of such body receive no compensation. Are such members covered by Worker's Compensation, and, if not, may the township contract for coverage pursuant to Revised Code section 4123.03?

Before addressing your specific questions, it is necessary to point out the general principles governing the Ohio Worker's Compensation system. R.C. 4123.54 provides, in pertinent part, that:

Every employee, who is injured . . . is entitled to receive . . . compensation for loss sustained on account of such injury . . . as provided by sections 4123.01 to 4123.94 of the Revised Code . . . (Emphasis added.)

"Injury" is defined in R.C. 4123.01 (C) as:

[A]ny injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. (Emphasis added.)

As you suggest, therefore, the determinative issue is whether the various individuals you describe in your request are "employees" as that word is defined in R.C. 4123.01.

The statutory definition of "employee" set forth in R.C. 4123.01 (A) (1) includes:

(1) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire express or implied, oral or written, including any elected official of the state, or of any county, municipal

corporation, or township, or members of boards of education; (Emphasis added.)

As with all provisions in the Worker's Compensation laws, this section must be "liberally construed in favor of employees." R.C. 4123.95.

Under the terms of R.C. 4123.01 (A) (1), an individual in the service of the State or the political subdivisions enumerated therein must serve pursuant to an appointment or contract of hire. The Ohio Supreme Court in Coviello v. Industrial Commission, 129 Ohio St. 589 (1935), held that there must be an express or implied contract of hire in order for the relationship of employer and employee to exist under this statutory language. The Court, moreover, in construing the statutory provision then in effect, held that it was impossible for a contract for hire to exist in the absence of an obligation on the part of the employer to pay the employee.

While the tests set forth in Coviello, supra, are instructive and vital in determining whether an employer-employee relationship exists under the current provisions of R.C. 4123.01(A)(1), it should be noted that the necessity of payment to the existence of such a relationship has been subsequently limited by the General Assembly. Under the provisions of Am. Sub. H.B. No. 1066, 129 Laws of Ohio 1801, 1961, the definition of employee set forth in R.C. 4123.01(A)(1) was expanded to include regular members of lawfully constituted township police and fire departments, whether paid or volunteer.

Consequently, the fact that township police department members serve as volunteers does not, in itself, prevent otherwise qualified personnel from meeting the definition of "employee" set forth therein. From information you have supplied, however, it is my understanding that the auxiliary trainees in question are not required to adhere to any schedule for performance of their duties, but need only assist officers for a specified number of hours per month. The trainee's function is totally subordinate to those of regular officers and it is my understanding that the trainees function essentially as observers. For these reasons, under even the most liberal imaginable construction of the term "regular member" of a township police department, I must conclude that an auxiliary trainee described in your first question does not qualify as an "employee" under the terms of R.C. 4123.01(A)(1).

It is, however, significant that R.C. 4123.03, the statutory provision which allows the state or one of its political subdivisions to contract for coverage on persons in its service who do not qualify as employees under R.C. 4123.01 (A) (1), specifically includes "volunteer firemen, and auxiliary policemen" among those who will need special coverage. By so providing in this statute, the General Assembly recognized that persons rendering auxiliary services are among those in public service who are not included as "employees." You have asked in your first question whether an auxiliary trainee who is not eligible for coverage under R.C. 4123.01(A)(1) may be covered under R.C. 4123.03, which provides as follows:

If the state or any political subdivision thereof, including any county, township, municipal corporation, school district, and any institution or agency of the state, employs, enlists, recruits, solicits, or otherwise secures the services of any organization, association, or group of persons and the members thereof, including volunteer firemen, and auxiliary policemen and patrolmen, the individual members of which are not, by reason of such service, employees as defined in division (A) (1) of section 4123.01 of the Revised Code, or if the state or any political subdivision thereof desires to secure workers' compensation in respect of any volunteer fireman, policeman, deputy sheriff, marshal or deputy marshal, constable, or other person in its service in the event of the injury, disease, or death of such person while engaged in activities called for by his position but not such as would entitle such person to compensation as an employee

as so defined, subject of the limitations contained in section 4123.02 of the Revised Code, the state or such political subdivision may contract with the industrial commission for coverage of such persons under sections 4123.01 to 4123.94 of the Revised Code, while in the performance of such service. (Emphasis added.)

From this section, it is clear that a person in the service of the state or any of its subdivisions who does not qualify as an employee under R.C. 4123.01 (A) (1) may still participate in the Worker's Compensation system if the subdivision contracts for coverage with the Industrial Commission. In fact, this section specifically contemplates coverage for "volunteer . . . policemen . . ." Therefore, in answer to the second part of your first question, a township police district may obtain coverage for a police trainee ineligible for coverage under R.C. 4123.01(A)(1) by contract with the Industrial Commission under R.C. 4123.03.

Your second question raises a somewhat different problem, for it is my understanding that the officials mentioned in that question do receive compensation from the township for each meeting attended. Under R.C. 4123.01(A)(1), *supra*, it thus appears that members of the township zoning commission and the board of zoning appeals are persons in the service of a township under an appointment or contract of hire, and are thereby "employees."

While normally the relationship of employer and employee for purposes of the Worker's Compensation law requires some control over the manner in which an "employee" performs his duties, 1976 Op. Att'y Gen. No. 76-040, I am convinced that requirement is unnecessary in this particular instance. I reach that result on the basis of R.C. 4123.01(A)(1) itself. The section specifically includes elected officials, and, although the persons on the zoning commission and board of zoning appeals must have autonomy, the township would have no less control over them than over elected officials in performance of their duties. Moreover, under R.C. 519.04 and R.C. 519.13, the statutes under which such commissions and boards are established, the township trustees retain the authority to remove members for cause. Thus, even under a direct control test the members in question are subject to some limited control by the township. Accordingly, I must conclude that members of a township zoning commission, appointed pursuant to R.C. 519.04, and members of a township board of zoning appeals, appointed pursuant to R.C. 519.13, are persons in the service of the township under an "appointment or contract of hire," and are therefore "employees" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).

Your final question concerns members of a township planning commission. Significantly, the planning commission is strictly advisory, and in fact, no statutory authority exists for the establishment of such a commission. The members receive no compensation. As discussed above, the terms of R.C. 4123.01(A)(1) include even volunteer regular members of township police and fire departments within the definition of "employees." Under the reasoning of *Coviello, supra*, however, the existence of an obligation to pay for services rendered remains a vital element in the existence of an appointment or contract of hire. For this reason, I am constrained to conclude that the members of the township planning commission described in your third question are not employees within the meaning of R.C. 4123.01(A)(1).

You have, however, inquired as to whether such members may be provided coverage under R.C. 4123.03. Members of the planning commission are certainly persons in the service of the township, and under the terms of R.C. 4123.03, *supra*, the members could conceivably obtain coverage through a contract between the township and the Industrial Commission. There is, however, one major obstacle to such a contract. Townships are creatures of statute, and as such they have very limited powers. The limited authority of townships is particularly clear with regard to spending powers. *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 346 (1957). Whenever there is any doubt as to the township's authority to expend funds, all doubts must be resolved against such an expenditure.

As you indicate, the planning commission is an advisory body whose members receive no compensation. Further, no statutory authority exists for the creation of such a body, and therefore, under the doctrine of limited powers, expressed in Yorkavitz, supra, the township would have no authority to compensate the members of the commission in any way. The problem thus presented is whether the township has the authority to contract for Worker's Compensation for the members, and thereby compensate them indirectly. I am unable to find any authority in support of such a contract, and, keeping in mind the very limited authority of the township trustees to expend township funds, I must conclude that such a contract would be inappropriate. It appears self evident that the township trustees lack the authority to contract for Worker's Compensation for persons whom they would be unable to compensate directly. Therefore, in answer to the second branch of your third question, the township trustees may not contract for Worker's Compensation coverage under R.C. 4123.03 for members of a township planning commission. The situation is distinguishable from the situation of the police trainee in your first question since a township police district could, if it chose to do so, compensate the trainee directly. R.C. 505.49. With a planning commission, no such option exists.

Accordingly, it is my opinion, and you are so advised that:

1. A township police trainee who receives no compensation for his services, who has no regular duty schedule, and who is not a "regular member of a lawfully constituted police force," is not an "employee" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).
2. A township police trainee who does not qualify as an "employee" under R.C. 4123.01 (A) (1) may nonetheless be covered by the Worker's Compensation system if the township enters into a special contract for such coverage under R.C. 4123.03.
3. Members of a township zoning commission appointed by a board of township trustees under R.C. 519.04, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
4. Members of a township board of zoning appeals, appointed by the board of township trustees pursuant to R.C. 519.13, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
5. Where a board of township trustees creates an advisory panel known as a township planning commission, and the formation of such a commission is not authorized by statute, and the members of that commission receive no compensation, then the members are not "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1). Coverage for such members may not be obtained by contract under R.C. 4123.03 since the township would not be authorized to expend funds for such a purpose.

**OPINION NO. 78-032****Syllabus:**

R.C. 1155.16 does not prohibit the Superintendent of Building and Loan Associations from releasing to the Legislative Service Commission, an arm of the General Assembly, the reports received pursuant to Section 3 of Am. H.B. 485, effective November 4, 1975, containing information required by R.C. §1343.011.

**To: Roger W. Tracy, Jr., Supt. of Building and Loans, Columbus, Ohio**  
**By: William J. Brown, Attorney General, May 25, 1978**

I have before me your request for my opinion regarding the following question:

Does the language of R.C. §1155.16 prohibit or prevent the Superintendent of Building and Loan Associations from releasing to the Legislative Service Commission, an arm of the General Assembly, the reports received as a result of Section 3 of Amended House Bill 485, which changed R.C. §1343.01 and enacted §1343.011 (effective November 4, 1975)?

Amended H.B. 485, effective November 4, 1975, enacted R.C. 1343.011 and amended R.C. 1343.01 to permit additional exemptions from the maximum interest rate previously imposed upon all parties to any bond, bill, promissory note, or other instrument for the forbearance or payment of money at any future time. As amended Code 1343.01(B)(4) permits the parties to a loan secured by a mortgage, deed of trust or land installment contract on real estate to fix the interest rate on such loan at any figure not exceeding three percent over the discount rate on ninety day commercial paper in effect at the Fourth District Federal Reserve Bank at the time the lending contract is executed. Section 3 of Am. H.B. 485, however, provides in part, as follows:

The Superintendent of Banks and the Superintendent of Building and Loan Associations, after joint consultation, shall each promulgate like rules requiring all institutions under their respective jurisdictions to file certain reports on their residential mortgage loans .... Such rules shall require the filing by identified dates of quarterly reports with the respective superintendent, stating the amount, interest rate, term and location of the security for each such loan made during the preceding quarter. The reports shall contain such information concerning such loans, and similar loans made for a reasonable period not to exceed two years prior to this act, as shall be prescribed by the rule to assist the General Assembly in determining the effects of the addition of division (B)(4) to section 1343.01 of the Revised Code. The reports shall be required for eight calendar quarters, commencing with the quarter in which this act takes effect.

The above language clearly states that the required reports are to be used to assist the General Assembly in determining the effects of the legislation. Your question arises in light of the provisions of R.C. 1155.16 which place general limitations upon the use of information obtained by the Superintendent of Building and Loan Associations, his deputies, assistants, clerks and examiners. R.C. 1155.16 specifies that the Superintendent and his assistants shall "keep secret the information obtained in an examination or by reason of their official position".

For the following reasons, I am of the opinion that R.C. 1155.16 does not prohibit or prevent the Superintendent from releasing the reports in question to the Legislative Service Commission. Section 3 of Am. H.B. 485 clearly directs that the reports shall be used to assist the General Assembly. The Legislative Service Commission was created by R.C. 103.11 as an arm of the legislative branch of government. The powers and duties of the Commission, as set forth in R.C. 103.13, include the duty and authority to:

(A) Conduct research, make investigations, and secure information or data on any subject and make reports thereon to the general assembly;

....

(C) Make surveys, investigations, and studies, and compile data, information, and records on any question which may be referred to it by either house of the general assembly or any standing committee of the general assembly:

....

(F) Collect, classify, and index the documents of the state which shall include executive and legislative documents and departmental reports and keep on file all bills, resolutions, and official journals printed by order of either house of the general assembly;

(G) Provide members of the general assembly with impartial and accurate information and reports concerning legislative problems in accordance with rules prescribed by the commission.

In light of the statutory function of the Legislative Service Commission, the release of the reports in question to the Commission clearly would assist the General Assembly as required by Section 3 of Am. H.B. 485.

What is more important, however, R.C. 1155.16 provides in full:

The superintendent of building and loan associations and his deputies, assistants, clerks, and examiners shall keep secret the information obtained in an examination or by reason of their official position, except when the public duty of such persons requires them to report upon or take official action regarding the affairs of the building and loan association examined, and shall not willfully make a false official report as to the condition of such association. This section does not prevent the proper exchange of information relating to building and loan associations, and to their business, with the representatives of building and loan departments of

other states or with the representatives of the federal home loan bank board.

Whoever violates this section shall be removed from office and shall be liable in damages, with his bondsmen, to the person or corporation injured by the disclosure of such secrets.

While R.C. 1155.16 requires the Superintendent to keep certain information confidential, the express terms of this statute specify that it does not prevent the proper exchange of information relating to building and loan associations with other state and federal building and loan association regulatory departments. It would be anomalous to read these provisions so restrictively as to prevent the Superintendent from providing the General Assembly with the very information that it has, by the later enacted provisions of Am. H.B. 485 requested from him and the Superintendent of Banks.

Finally, it should be noted that R.C. 1155.16 makes further exception to the requirement of confidentiality. The Superintendent must keep confidential information obtained in his official capacity except when his "public duty requires him to report upon or take official action regarding the affairs of the building and loan association examined". The legislative directive of Am. H.B. 485 clearly imposes a "public duty" upon the Superintendent to provide the reports to the General Assembly.

Therefore, in specific answer to your question, it is my opinion and you are so advised, that the language of R.C. 1155.16 does not prohibit the Superintendent of Building and Loan Associations from releasing to the Legislative Service Commission an arm of the General Assembly, the reports received pursuant to Section 3 of Am. H.B. 485, effective November 4, 1975, containing information required by R.C. §1343.011.

### OPINION NO. 78-033

#### Syllabus:

A board of education is not required to pay wages to a vocational education student who, as part of the approved curriculum, works on a construction project for the benefit of the school district or a third party.

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To: **Helen W. Evans, Director, Dept. of Industrial Relations, Columbus, Ohio**  
By: **William J. Brown, Attorney General, June 6, 1978**

I have before me your request for my opinion concerning the payment of wages to vocational education students. In your letter you indicate that your office has received a number of complaints concerning the use of non-paid vocational students on private and school district building projects. You have therefore requested my opinion on the following specific questions:

1. Must wages be paid to a vocational student who works on a construction site or on any other project belonging to a private party where the project in

question has been approved by the school board as part of the curriculum?

2. Would payment of wages to students be required if the project was for the school district itself, i.e. building an addition to an existing school building, but where again the project has been labeled part of the vocational school's curriculum?
3. If wages are to [be] paid to a vocational student on such a construction project, is the rate of wage to be determined in accordance with Chapter 4111 of the Revised Code, or would Chapter 4115 R.C. be applicable?

R.C. 3313.90 requires that each school district establish and maintain a vocational education program adequate to prepare a student enrolled therein for an occupation. As I indicated in 1971 Op. Att'y Gen. No. 71-068, the purpose of vocational education programs is to enable high school students to develop saleable skills, to motivate students to complete their high school training and to develop attitudes necessary in the work-a-day world. In order to fulfill their statutory duties pursuant to R.C. 3313.90, school districts across the state have developed educational programs which often replicate in detail the actual work environment.

I have on several prior occasions considered the power of a board of education to undertake such programs. On each occasion I have concluded that a board of education may exercise its discretion in the design and implementation of such programs. See 1976 Op. Att'y Gen. No. 76-065 (A joint vocational school may construct and sell single family residences as part of its vocational education program); 1971 Op. Att'y Gen. No. 71-068 (A school district may engage in private enterprise, even at a profit, if the program is reasonably necessary to the vocational education curriculum); 1971 Op. Att'y Gen. No. 71-026 (Use of school facilities for serving meals and banquets to community organizations is justified as part of the vocational education curriculum).

It is my understanding that students who participate in vocational education programs are graded on their performance and receive classroom credit upon satisfactory completion of the course. I shall assume that classroom credit will be given for the satisfactory completion of the courses about which you have inquired and that in the question of whether wages must be paid to such students the wages are intended to be in addition to classroom credit.

With but one exception, none of the various provisions in R.C. Chapter 3313 relating to the administration of vocational education programs make mention of the payment of wages to students who participate in such programs. The one exception is set forth in R.C. 3313.93 as follows:

A board of education operating an occupational work adjustment laboratory in which students work to produce items on a contract basis for public agencies, private individuals, or firms may pay wages to such students as may be determined by the board. Such students shall not be considered employees of the board for the purposes of Chapters 3309, 3319, 4123, and 4141 of the Revised Code, or for any other purpose under state or federal law. (Emphasis added.)

The term, occupational work adjustment laboratory, is not statutorily defined. It is my understanding, however, that the term refers to a specially equipped school laboratory designed to provide instruction in work adaptability skills to handicapped or disadvantaged students who are not capable of succeeding in a regular school program. The provisions of R.C. 3313.93 are, therefore, applicable only to a limited number of highly specific vocational programs.

Moreover, even in those specific situations to which R.C. 3313.93 applies, the payment of wages to students is permissible rather than mandatory.

I have also considered whether R.C. Chapter 4111, the Minimum Fair Wage Standards Law, requires a school district to pay wages to students participating in vocational education programs. It is my opinion that it does not. R.C. 4111.02 sets forth the minimum wage rates that every employer must pay each of his employees. Thus, R.C. 4111.02 only applies where there is an employment relationship. The fact that the vocational educational program produces, as a by-product of the program, a saleable commodity or a building or improvement benefitting the school district or a private contractor does not necessarily transform the relationship between the school district and the student into that of an employment. The primary purpose of the relationship is still the education and development of the student. Moreover, even if it could be successfully argued that the unique characteristics of a vocational education program make the relationship one of an employment, R.C. 4111.01 (E) (7) would exempt the school district from the payment of wages. R.C. 4111.01(E) (7), which defines an employee for the purposes of R.C. Chapter 4111, expressly states that employee does not include "[a] member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state.

With respect to vocational education programs dealing with the construction of buildings or other public improvements by or for the benefit of a school district or other governmental unit, it is also necessary to consider the applicability of R.C. 4115, which governs the payment of wages on public works projects.

R.C. 4115.04 provides, in part, as follows:

Every public authority authorized to contract for or construct with its own forces a public improvement, . . . shall have the department of industrial relations determine the prevailing rates of wages for mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed.

R.C. 4115.06 provides, in part, as follows:

In all cases where any public authority fixes a prevailing rate of wages under 4115.04 of the Revised Code, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed . . . Where a public authority constructs a public improvement with its own forces, such public authority shall pay a rate of wages which shall not be less than the rate of wages fixed as provided in section 4115.04 of the Revised Code . . .

Pursuant to R.C. 4115.03(A), public authority means "any officer, board or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by direct employment of labor . . ." A board of education is, therefore, a public authority for the purposes of R.C. Chapter 4115. I shall assume, moreover, that there are vocational education projects which constitute the "construction" of a "public improvement" as defined in R.C. 4115.03(B) and R.C. 4115.03(C). The applicability of R.C. Chapter 4115 to such vocational educational projects depends, however, on whether the students participating in such programs can be classified as mechanics and laborers for the purposes of R.C. 4115.04.

Since R.C. Chapter 4115 does not provide a definition for laborer or mechanic, the common usage of these terms is controlling. R.C. 1.42. In 1977 Op. Att'y Gen.

No. 77-076, I concluded that "[a]n individual practicing a particular trade or occupation qualifies as a laborer, workman or mechanic, as those terms are used in R.C. 4115.04 and R.C. 4115.05, if members of the same trade or occupation are paid wages pursuant to the terms of a collective bargaining agreement or an understanding between employers and bona fide labor organizations." It is my opinion that a vocational education student does not qualify as a mechanic or laborer under this definition. A vocational education student is not practicing a particular trade or occupation other than that of student. While the student does perform many of the functions of the workman or laborer, the scope of his performance is limited to the approved curriculum and the duration of the course. Moreover, the given purpose of the student's activities is to develop skills and attitudes which will assist the student in entering, at some future time, the occupation to which he aspires. Since a student does not become a mechanic or laborer by virtue of his participation in a vocational education program, R.C. Chapter 4115 imposes no duty on a board of education to pay such students wages.

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

A board of education is not required to pay wages to a vocational education student who, as part of the approved curriculum, works on a construction project for the benefit of the school district or a third party.

#### OPINION NO. 78-034

#### Syllabus:

1. R.C. 3354.09 authorizes a board of trustees of a community college district to purchase or otherwise acquire real property for the purpose of drilling for natural gas or other energy resources necessary to the operation of district programs and facilities where such an acquisition enables the board to obtain such resources more cheaply than through a direct purchase.
2. Where a board of trustees of a community college district is authorized under the terms of R.C. 3354.09 to acquire land for the purpose of drilling for natural gas or other energy resources, public funds may be expended for such an acquisition and for the extraction of resources.

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To: **Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
By: **William J. Brown, Attorney General, June 9, 1978**

I have before me your request for my opinion which poses the following questions:

1. May a community college, created under the authority of Chapter 3354 of the Revised Code, purchase or lease property for the purpose of drilling its own natural gas wells?
2. May a community college, created under the authority of Chapter 3354 of the Revised Code, expend

public funds for the purpose of drilling its own natural gas wells?

It has been the position of the Attorneys General of Ohio for a number of years that when the legislature intends to authorize a public body or official to dispose of state owned minerals, it does so in very specific terms and that such authority will not be inferred from general authority to acquire or dispose of real property. 1975 Op. Att'y Gen. No. 75-093; 1958 Informal Op. Att'y Gen. No. 92; 1953 Op. Att'y Gen. No. 3099. However, under the express terms of R.C. 3354.02, a community college district is a political subdivision of the state. Moreover, R.C. 3354.13 specifies that ownership of a community college, including all right, title and interest in and to all property thereof, shall be vested in the board of trustees of such district. It is apparent, therefore, that minerals or mineral rights in the hands of such a board of trustees are the property of the board rather than being state owned. The answers to your questions, therefore, require an analysis of the general powers and duties of the board of trustees of a community college district.

R.C. 3354.01 et seq. provides for the creation of community college districts and for the establishment and operation of community colleges within such districts. R.C. 3354.09 specifies the powers of a board of trustees of a community college district and confers upon such board a broad grant of authority to own, operate and manage a community college. In pertinent part, that section provides that a board may:

(A) Own and operate a community college . . .

. . . .

(B) Hold, encumber, control, acquire by donation, purchase, or condemnation, construct, own, lease, use and sell real and personal property as is necessary for the conduct of the program of the community college on whatever terms and for whatever consideration may be appropriate for the purpose of the college;

. . . .

(E) Provide for a community college, necessary lands, buildings or other structures, equipment, means, and appliances;

. . . .

(J) Prescribe rules and regulations for the effective operation of a community college and exercise such other powers as are necessary for the efficient management of such college;

R.C. 3354.13 further provides that a board of trustees of a community college district may acquire by appropriation any land, rights, rights of way, franchises, easements or other property necessary or proper for the efficient operation of any facility of the district.

It is a long-standing principle of Ohio law that where an officer or body is directed by statute to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed. State ex rel. Hunt v. Hildebrand, 93 Ohio St. 1 (1915); State, ex rel. Copland v. State Medical Bd., 107 Ohio St. 20, 29 (1923); State, ex rel. Byrd v. Sherwood, 140 Ohio St. 173, 181 (1942). It is apparent, therefore, that the provisions of R.C. 3354.09 and 3354.13 repose in the board of trustees of a community college district the authority to do all acts necessary for the operation of community college facilities programs within the district.

The use of energy resources to provide heat, light and water is, of course, essential to the operation of institutions of higher learning. Thus, under the provisions of R.C. 3354.09, it is apparent that a board of trustees of a community college district is authorized to purchase and consume the energy resources necessary to meet its needs. I am, therefore, of the opinion that if a board of trustees is able to obtain natural gas or other vital energy resources necessary to the operation of its programs and facilities more cheaply by drilling its own wells than by purchasing through commercial suppliers, the provisions of R.C. 3354.09 authorize the board to purchase or lease land in order that it may drill to obtain such resources.

The conclusion that a board of trustees has the authority, under the circumstances discussed above, to acquire land for the purpose of drilling for natural gas does not, however, imply that such a board is authorized to embark upon such a venture jointly with a commercial gas company or other private enterprise. Business partnerships between the state or subdivisions thereof and individuals, associations or private corporations are prohibited under the terms of art. VIII, §§4, 5, Ohio Constitution. *Walker v. Cincinnati*, 21 Ohio St. 14 (1871). The purpose of these constitutional provisions is to impose a broad prohibition against the intermingling of public and private funds. *State, ex rel. Saxbe v. Brand*, 176 Ohio St. 44 (1964). See, also, 1977 Op. Att'y Gen. No. 77-049; 1977 Op. Att'y Gen. No. 77-047. While I am unaware of any cases which discuss the applicability of art. VIII, §§4, 5, Ohio Constitution, to a community college district created under R.C. 3354.01 et seq., the conclusion that such a district is subject thereto may be reasonably inferred from the evident meaning and spirit of these constitutional provisions. Consequently, I am of the opinion that a board of trustees of a community college district is not authorized to undertake a project involving drilling for natural gas as a joint venture.

Turning now to your second question, it should be noted that the General Assembly has provided several alternatives for the funding of a community college district. R.C. 3354.11 specifies that a community college district may submit to the electors of the district the question of issuing bonds for the purpose of paying all or part of the cost of purchasing sites for the erection and furnishing of buildings and for the acquisition or construction of any property which the board of trustees is authorized to acquire or construct, provided that such property has an estimated useful life of five years or more. Thus, where a board of trustees seeks to acquire or construct property by means of bonds issued pursuant to R.C. 3354.11, the purpose of the acquisition or construction must be one authorized by law. As discussed above, it is my conclusion that a board of trustees is authorized under the terms of R.C. 3354.09 to acquire land for the purpose of drilling its own natural gas wells, provided that such an acquisition enables the board to obtain natural gas or other necessary resources more cheaply than a purchase through commercial suppliers. It follows that a board of trustees, under the terms of R.C. 3354.11, is authorized to use funds generated pursuant thereto for the acquisition of land for the purposes of drilling natural gas where such a purpose is authorized under the terms of R.C. 3354.09 and where the estimated useful life of any property acquired is at least five years.

In addition, the board of trustees of a community college district is defined as a taxing authority by R.C. 5705.01. R.C. 5705.03 provides that such a taxing authority may, in accordance with the provisions of R.C. Chapter 5705, levy taxes annually for the purpose of paying the current operating expenses of the subdivision or the cost of constructing permanent improvements. R.C. 5705.05 specifies that the purpose of a general levy for current expenses must be for carrying into effect any of the general or special powers granted by law to a subdivision. Since, pursuant to R.C. 3354.09, a board of trustees of a community college district is empowered to acquire land for the purpose of drilling its own natural gas wells where such drilling enables the board of trustees to obtain natural gas more cheaply than through direct purchase, it follows that an expenditure of funds generated pursuant to R.C. 5705.05 may properly be made for such purpose.

R.C. 5705.10 specifies that monies derived from a special levy shall be credited to a special fund for the purpose for which the levy was made. That

section further requires that all money paid into a special fund so created shall be used only for the purposes for which such fund is established. Consequently, where a tax has been levied for purposes encompassing the operation and continuance of programs of a community college district, expenditure of funds generated thereby for the purpose of acquiring natural gas which is necessary to the operation of community college district programs and facilities is proper.

In summary, therefore, it is my opinion, and you are so advised that:

1. R.C. 3354.09 authorizes a board of trustees of a community college district to purchase or otherwise acquire real property for the purpose of drilling for natural gas or other energy resources necessary to the operation of district programs and facilities where such an acquisition enables the board to obtain such resources more cheaply than through a direct purchase.
2. Where a board of trustees of a community college district is authorized under the terms of R.C. 3354.09 to acquire land for the purpose of drilling for natural gas or other energy resources, public funds may be expended for such an acquisition and for the extraction of resources.

#### OPINION NO. 78-035

#### Syllabus:

The terms of R.C. 4115.03(B) exempt from the operation of the prevailing wage laws only the full-time, non-probationary employees in the classified service of a public authority included within the scope of R.C. 124.11.

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**To: Helen W. Evans, Director, Dept. of Industrial Relations**  
**By: William J. Brown, Attorney General, June 13, 1978**

I have before me your request for my opinion which reads as follows:

I must request your opinion for the purpose of clarifying certain aspects of Chapter 4115 of the Ohio Revised Code. Section 4115.03(B) indicates that work done by full-time non-probationary employees in the classified service of a public authority is excluded from the operation of Ohio's prevailing wage laws.

The problem has arisen in that many public authorities afford their employees the protections of a civil service system but they have not established such a system per se. In many jurisdictions these protections such as a right to appeal personnel actions have been extended to unclassified personnel as well. In applying the prevailing wage statutes to these public authorities, the contention has been raised that these employees fall within the exemption stated in 4115.03(B) R.C. on a de facto basis if not de-jure.

I must request explication as to when the "classified service" exemption of Section 4115.03(B) of the Ohio Revised Code is applicable to a public works project constructed by a public authority using its own forces.

The provisions of R.C. Chapter 4115 set a number of requirements applicable to wages and hours on public works. For example, R.C. 4115.04 requires that every public authority authorized to contract for or construct with its own forces a public improvement have the Department of Industrial Relations determine the prevailing rate of wages for the class of work called for by an improvement prior to advertising for bids or undertaking construction with its own forces.

As you have noted, however, the definitions set forth in R.C. 4115.03 govern the prevailing wage provisions of R.C. 4115.03 to 4115.10 inclusive. R.C. 4115.03(B) defines "construction" for the purposes of R.C. 4115.03 to 4115.10 as follows:

"Construction" means any construction, reconstruction, improvement, enlargement, alteration, repair, painting or decorating of any public improvement fairly estimated to cost more than two thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority. (Emphasis Added).

Consequently, work done by full-time non-probationary, classified employees of a public authority is, by definition, not construction and such work thus is not subject to the prevailing wage requirements of R.C. 4115.03 to 4115.10.

Your question, therefore, centers upon a determination of which employees shall be considered as in the classified service of a public authority so as to exempt work performed by such employees from the prevailing wage requirements of R.C. 4115.03 to 4115.10. R.C. 4115.03(A) defines "public authority" in the following terms:

"Public authority" means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds.

While there is no definition of the term "classified service" provided in R.C. Chapter 4115, a reference to the civil service laws is clear. R.C. 124.11 divides the civil service of the state, the several counties, cities, civil service townships, city health districts, general health districts and city school districts into the classified and unclassified service as therein provided. When a public employee enjoys classified status for the purposes of Ohio's civil service laws, he does so as provided by R.C. 124.11. Under the terms of R.C. 124.11, an employee in the classified service must be in the service of the State or one of the subdivisions enumerated therein. See, e.g., 1976 Op. Atty Gen. No. 76-018; 1965 Op. Atty Gen. No. 65-121; 1962 Op. Atty Gen. No. 3073.

As you have observed, there are political subdivisions of the state which are "public authorities" as defined by R.C. 4115.03(A) but are not included within the terms of R.C. 124.11. Some of these subdivisions elect to provide protections to their employees similar to those extended to employees in the classified service as defined by R.C. 124.11. While the governing officer or body of such a subdivision is, in many instances, empowered to grant such protections to the employees of the subdivision, the extension of protection does not confer upon the employees involved "classified" status under the terms of R.C. 124.11. I am of the opinion that the governing officer or body of a political subdivision not included within the scope of R.C. 124.11 lacks the authority to exempt its work force from the

application of the prevailing wage laws, since the parameters of the classified civil service are set by the provisions of R.C. 124.11.

In specific answer to your question, it is my opinion, and you are so advised, that the terms of R.C. 4115.03(B) exempt from the operation of the prevailing wage laws only the full-time, non-probationary employees in the classified service of a public authority included within the scope of R.C. 124.11.

### OPINION NO. 78-037

#### Syllabus:

A county is authorized, pursuant to R.C. 5705.19(J), to place a tax levy on the ballot for funds to be used by a sheriff for the salaries of permanent sheriff's personnel performing police duties and other equipment used directly by the sheriff in the performance of his duties.

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**To: Rocky A. Coss, Highland County Pros. Atty., Hillsboro, Ohio**  
**By: William J. Brown, Attorney General, June 13, 1978**

I have before me your request for my opinion which reads as follows:

1. Do the words "police department" and "permanent police personnel" as used in Section 5705.19(J) O.R.C. include sheriff's departments and permanent full time sheriff's deputies and employees?
2. Under Section 5705.19(J) O.R.C., is a county authorized to place a tax levy on the ballot to be used for funding a sheriff's department for salaries, communications equipment and other equipment?

The two questions raised in your letter concern the same issue and may be addressed together. R.C. 5705.19(J) provides in pertinent part as follows:

The taxing authority of any subdivision at any time and in any year, by vote of two-thirds of all members of said body, may declare by resolution and certify such resolution to the board of elections not less than sixty days before the election upon which it will be voted, that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:

. . .

(J) For the purpose of providing and maintaining motor vehicles, communications, and other equipment used directly in the operation of a police department, or in the payment of salaries of permanent police personnel.

Pursuant to R.C. 5705.01(A), a county is a subdivision for the purpose of R.C. Chapter 5705. Accordingly, it is authorized to place a tax levy on the ballot for

the purpose of obtaining funds for salaries, communications and other equipment for the county sheriff's department if such department is a "police department" for the purpose of R.C. 5705.19(J).

The terms "police," "police department" and "permanent police personnel" are nowhere defined in R.C. Chapter 5705. Accordingly, it is necessary to construe such terms according to the rules of grammar and common usage. See R.C. 1.42. "Police" is defined in Black's Law Dictionary (4th Ed.) as:

The function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety, and morals, and the prevention, detection, and punishment of crimes.

R.C. 311.07 imposes upon a sheriff to preserve the public peace. Accordingly, the sheriff and his deputies perform police functions. As such, a sheriff's department is a "police department" for the purpose of R.C. 5705.19(J). Therefore I conclude that a county is authorized, pursuant to R.C. 5705.19(J), to place a tax levy on the ballot for funds to be used by a sheriff for salaries of permanent sheriff's personnel performing police functions and for communications and other equipment used directly by the sheriff in the performance of his duties.

Therefore, it is my opinion, and you are so advised, that a county is authorized, pursuant to R.C. 5705.19(J), to place a tax levy on the ballot for funds to be used by a sheriff for the salaries of permanent sheriff's personnel performing police duties and other equipment used directly by the sheriff in the performance of his duties.

### OPINION NO. 78-038

**Syllabus:**

1. The phrase "having reason to believe" as used in R.C. 2151.421 is equivalent to "known or suspected" as used in 45 C.F.R. 1340.3-3(d).
2. The term "child neglect" as used in R.C. 2151.421 applies to children without proper parental care or guardianship as defined by R.C. 2151.05.

**To: Kenneth B. Creasy, Director, Dept. of Public Welfare, Columbus, Ohio**  
**By: William J. Brown, Attorney General, June 14, 1978**

I have before me your request for my opinion addressing the following questions:

1. Is the language "having reason to believe" in section 2151.421 of the Ohio Revised Code equivalent to the language "known or suspected" as used in 45 CFR, 1340.3-3(d)?
2. Does the term "child neglect" as used in R.C. 2151.421,

apply to children referred to as "without proper parental care or guardianship" in R.C. 2151.05?

From further information supplied by you I understand that your request stems from efforts by your office to qualify Ohio for federal funds under the Child Abuse Prevention and Treatment Act, P.L. 93-247 (1974). Section 4 of that act provides for grants of funds to states to aid them in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

In order for a state to qualify for such assistance, P.L. 93-247 Sec. 4(b)(2), 42 U.S.C.A. § 5103(b)(2), establishes certain criteria which must be met and states, in pertinent part, as follows:

(2) In order for a State to qualify for assistance under this subsection, such State shall -

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

The provisions of 45 C.F.R., 1340.3-3(d), to which you refer, were promulgated by the Department of Health, Education and Welfare to implement 42 U.S.C.A. § 5103(b)(2) and to provide guidelines for compliance with that statute. The C.F.R. qualifications match those of the statute.

R.C. 2151.421, which provides for the reporting of child abuse or neglect, reads in pertinent part as follows:

Anyone having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of such child may report or cause reports to be made of such information to the children services board or the county department of welfare exercising the children services function, or to a municipal or county peace officer.

Your first question is whether the language "having reason to believe" in R.C. 2151.421 is equivalent to "known and suspected" as used in 43 U.S.C.A. § 5103(b)(2). R.C. 1.42 prescribes that words and phrases used in a statute shall be read in context and construed according to the rules of grammar and common usage. As a matter of common usage, the terms are synonymous in that both phrases connote having some information upon which to form a belief.

As early as 1880, the United State Supreme Court recognized these terms as synonymous, stating in Shaw v. Merchants' National Bank of St. Louis, 101 U.S. (11 Otto) 557 (1880) at 566:

It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he is a reasonable being.

Therefore, in answer to your first question, it is my conclusion that the phrase "having reason to believe" in R.C. 2151.421 is equivalent to "known or suspected" as used in U.S.C.A. § 5103(b)(2) and the provisions of 45 C.F.R., 1340.3-3(d) promulgated thereunder.

In respect to your second question, I must point out to you that the definitions used in R.C. Chapter 2151 appear in the first few sections of such Chapter. R.C. 2151.03 defines "neglected child" in pertinent part as follows:

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:

- (A) Who is abandoned by his parents, guardian, or custodian;
- (B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

R.C. 2151.05 defines a child without proper parental care as follows:

Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

It should be noted that these definitions set forth above apply throughout R.C. Chapter 2151 and should be used in cases where they relate to other sections within that Chapter.

R.C. 2151.421 requires or permits, as the particular case may be, the reporting of child abuse and/or neglect. R.C. 2151.03 establishes criteria for determining when a child is neglected. Included in the definition of neglect set forth under R.C. 2151.03 is a child without proper parental care as defined under the terms of R.C. 2151.05. It is apparent that anyone who is required or authorized to report cases of child abuse or neglect pursuant to R.C. 2151.421 should include those children who meet the standards in R.C. 2151.05, as the definition set forth therein is one criterion for determining that a child is neglected under the terms of R.C. 2151.03.

Therefore, in specific answer to your questions, it is my opinion, and you are so advised:

1. The phrase "having reason to believe" as used in R.C. 2151.421 is equivalent to "known or suspected" as used in 45 C.F.R. 1340.3-3(d).
2. The term "child neglect" as used in R.C. 2151.421 applies to children without proper parental care or guardianship as defined by R.C. 2151.05.

**OPINION NO. 78-039****Syllabus:**

The Board on Unreclaimed Strip Mined Lands may expend monies in the unreclaimed lands fund, created by R.C. 1513.30, to rectify damage caused to public or private land as a result of the subsidence of underground mines, provided that the criteria of R.C. 1513.30 are otherwise met.

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**To: Robert W. Teater, Director, Ohio Department of Natural Resources,  
Columbus, Ohio**  
**By: William J. Brown, Attorney General, June 14, 1978**

I have before me your request for an opinion which concerns 1977 Am. H.B. 244. Specifically, you have raised the following question:

May the Board on Unreclaimed Strip Mines use funds allocated for its use to correct land subsidence precipitated by underground mining.

The Board on Unreclaimed Strip Mined Lands is created by R.C. 1513.29. That section provides, in pertinent part, as follows:

There is hereby created the board on unreclaimed strip mined lands.

. . . .

The board shall gather information, study, and make recommendations concerning the number of acres, location, ownership, condition, environmental damage resulting from the condition, cost of acquiring, reclaiming, and possible future uses and value of eroded lands within the state, including land affected by strip mining for which no cash is held in the strip mining reclamation special account

. . . .

The board shall report its findings and recommendations to the governor and the general assembly. . .

Under this section, the board has essentially a fact finding function. The enforcement powers under R.C. Chapter 1513 rest with the Chief of the Division of Reclamation. The spending powers are held jointly by the Board and the Chief.

R.C. Chapter 1513 establishes at least two special accounts within the state treasury. The first of these accounts, the strip mining administration and reclamation reserve special account, is created by R.C. 1513.181. That account is expressly limited to "reclaiming land affected by strip mining. . .," and therefore could not be used by the Board for projects involving subsidence of underground mines. The second account is created by R.C. 1513.30 which provides:

There is hereby created in the state treasury the unreclaimed lands fund, to be administered by the chief of the division of reclamation and used for the purpose

of reclaiming land, public or private, affected by mining or controlling mine drainage, for which no cash is held in the strip mining reclamation fund or the surface mining reclamation fund.

In order to direct expenditures from the unreclaimed lands fund toward reclamation projects that fulfill priority needs and provide the greatest public benefits, the chief shall periodically submit to the board on unreclaimed strip mined lands project proposals to be financed from the unreclaimed lands fund, together with benefit and cost data, and other pertinent information. For the purpose of selecting project areas and determining the boundaries of project areas, the board shall consider the feasibility, cost, and public benefits of reclaiming the areas, their potential for being mined, the availability of federal or other financial assistance for reclamation, and the geographic distribution of project areas to assure fair distribution among affected areas.

....

Expenditures from the unreclaimed lands fund may be made only for reclamation projects that are within the boundaries of project areas approved by the board, and expenditures for a particular project may not exceed any applicable limits set by the board. Disbursements from the unreclaimed lands fund shall be made by the chief, with the approval of the director of natural resources. (Emphasis added).

Unlike R.C. 1513.181, this section does not impose a restriction that the projects be limited to and affected by strip mining. Rather, this section allows monies in the Unreclaimed Land Fund to be used for any project which involves the restoration of lands adversely affected by mining activity. Further provision for the expenditure of monies in the unreclaimed lands fund is made by R.C. 1513.20, which, in pertinent part, specifies:

The chief of the division of reclamation, with the approval of the director of natural resources, may purchase or acquire by gift, donation, or contribution any eroded land, including land affected by strip mining, for which no cash is held in the strip mining reclamation fund. For this purpose the chief may expend monies deposited in the unreclaimed lands fund. . . .

While this section does not directly relate to the powers of the Board with respect to the unreclaimed lands fund, these provisions indicate that the fund may be used for reclamation projects where the damage did not result from strip mining.

Accordingly, it is my opinion and you are hereby advised that, the Board on Unreclaimed Strip Mined Lands may expend monies in the unreclaimed lands fund, created by R.C. 1513.30, to rectify damage caused to public or private land as a result of the subsidence of underground mines, provided that the criteria of R.C. 1513.30 are otherwise met.

**OPINION NO. 78-040****Syllabus:**

A board of education is prohibited by Ohio Const. art VIII, §4 from entering into a joint venture with a commercial oil company to construct and operate for profit a gas and service station on school property as part of a vocational education program.

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**To: James R. Unger, Stark County Pros. Atty., Canton, Ohio**  
**By: William J. Brown, Attorney General, June 14, 1978**

I have before me your request for my opinion which poses the following questions:

1. Whether a joint vocational school district has the authority under Section 3313.90 of the O.R.C. to enter into a joint venture with a commercial oil company to have constructed on school property, a gas and service station for the purpose of expanding vocational education to its students?
2. If such construction and maintenance of a gas and repair service station is permissible under Section 3313.90 of the O.R.C., would the joint vocational school be required to submit such a project to public bidding under Section 3313.46 of the O.R.C.?
3. Would such a joint venture with a private enterprise alter the school's present right to governmental immunity as it relates to administrators and school employees involving their liability to third party claims?
4. What limitations, if any, would be placed upon the joint vocational school if such a joint venture with a commercial oil company is permissible under Section 3313.90 of the O.R.C.?

As I understand it, the Stark County Area Joint Vocational School would like to enter into a joint venture with an oil and gas company to have the company construct a gas station on school property. The school intends to use students to operate the gas station under vocational staff supervision and with periodic consultation from the oil company's management team. Profits from the operation of the station would be shared by the company and the school on a basis to be negotiated in a future contract.

I have on several prior occasions considered the extent of a school district's authority pursuant to R.C. 3313.90, which requires each school district to establish a vocational education program in accordance with standards adopted by the state board of education. I have concluded on such occasions that R.C. 3313.90 vests in the board of education broad discretion to carry out this legislative mandate provided that any specific statutory limitations on the board's power are not exceeded and that the specific elements of any particular program do not go beyond that which is reasonably necessary to fulfill the requirements of the vocational education curriculum. See 1976 Op. Att'y Gen. No. 76-065 (A joint vocational school may construct and sell single family residences on school land.); 1971 Op. Att'y Gen. No. 71-068 (A school may engage and compete in private

enterprise, even at a profit, so long as the program is reasonably necessary to the vocational education curriculum); 1971 Op. Att'y Gen. No. 71-026 (Use of school facilities for serving meals and banquets to community organizations is justified as part of the vocational education curriculum).

A third limitation on a board of education's power to design and carry out vocational education programs is that such power must be exercised within the limitations set forth in the Ohio Constitution. The proposed joint venture must, therefore, be considered in relation to Ohio Const. art VIII, §4, which provides as follows:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

The prohibitions set forth in art. VIII, §4, *supra* are binding on the various agencies and instrumentalities of the state. State, ex rel. Saxbe v. Brand, 176 Ohio St. 44, 48 (1964) (The loaning or borrowing of money by the Ohio Development Financing Commission would be the loaning or borrowing of money by the state).

Although there is no case holding that a board of education is an agency or instrumentality of the state for the purpose of Ohio Const. art. VIII, §4, this result may reasonably be inferred from the evident meaning and spirit of the constitutional provision. Walker v. City of Cincinnati, 21 Ohio St. 14, 53 (1871) (The Constitution is to be construed according to its intention; that which clearly falls within the reason of the prohibition may be regarded as embodied in it.) The purpose of art. VIII, §4, *supra*, and Ohio Const. art VIII, §6, which imposes similar restrictions upon cities, counties, towns, and townships, is to impose a broad prohibition against the intermingling of public and private funds. State, ex rel. Saxbe v. Brand, 176 Ohio St. 44 (1964); Walker v. City of Cincinnati, *supra*, at 54. School district funds are clearly public funds and are statutorily regulated as such. See e.g. R.C. 135.01(K) (School district is subject to the provisions of the Uniform Depository Act.); R.C. 3313.29 (Bureau of Supervision and Inspection of Public Offices may prescribe manner of accounting for school district funds.) A conclusion that a board of education is not an instrumentality of the state for the purposes of art. VIII, §4, *supra*, would create a significant exception to the broad restrictions on the use of public funds intended by Ohio Const. art. VIII, §4, 6. Such result is inconsistent with the evident meaning and spirit of these constitutional provisions and is, therefore, impermissible.

Thus, it is my opinion that a board of education is an instrumentality of the state for purposes of Ohio Const. art. VIII, §4. Cf. Brown v. Board of Education, 20 Ohio St.2d 68 (1969) (A board of education is an arm or agency of the state for the purposes of sovereign immunity.)

I have on two recent occasions had the opportunity to discuss at length the breadth of the prohibitions set forth in art. VIII, §§4, 6, *supra*, and the various exceptions to these prohibitions. See, 1977 Op. Att'y Gen. No. 77-049; 1977 Op. Att'y Gen. No. 77-047. The situation under consideration is not such that further repetition of or elaboration upon the discussions in my prior opinions is necessary. The difficult questions arising from these constitutional provisions are concerned with what constitutes an impermissible grant or loan of credit. The prohibition against joint ventures set forth in the second clause in art. VIII, §4 and in art. VIII, §6 is more straightforward. In Walker v. City of Cincinnati, 21 Ohio St. 14, 54 (1871), the Ohio Supreme Court discussed the nature of this prohibition in the following terms:

The mischief which [art. VIII, §6] interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private

capital or enterprise in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein.

Ohio Const. art. VIII, §§4, 6 are to be interpreted in a like manner and cases construing one section are applicable to the other. State, ex rel. Eichenberger v. Neff, 42 Ohio App.2d 69 (Franklin County, 1974).

In the situation under consideration, the board of education proposes to enter into a formal agreement with a private corporation whereby both parties will contribute property, money, skill and knowledge in the operation of a common enterprise for mutual profit and gain. There can be little doubt that this proposed joint venture constitutes a business partnership or association subject to Ohio Const., art. VIII, §4.

The fact that the board of education proposes this joint venture in furtherance of what might be considered a public purpose mandated by R.C. 3313.90 is insufficient to validate the proposal. As I noted in Opinion No. 77-049, *supra*, while the public purpose exception to Ohio Const., art. VIII, §§4, 6 may be sufficient to validate the giving or loaning of credit to a non-profit corporation, it is insufficient to permit the extension of credit to a private business enterprise. The public purpose exception depends upon the nature of the recipient or partner as well as the purpose for which the funds are spent or the venture is undertaken.

It is, therefore, my opinion and you are so advised that a board of education is prohibited by Ohio Const., art. VIII, §4 from entering into a joint venture with a commercial oil company to construct and operate for profit a gas and service station on school property as part of a vocational education program.

#### OPINION NO. 78-041

##### Syllabus:

1. The Ohio Board of Building Standards has jurisdiction over places of outdoor assembly which qualify by definition as buildings pursuant to R.C. 3781.06(B).
2. The Ohio Board of Building Standards has jurisdiction over tents which possess the requisite components to qualify as a building under R.C. 3781.06(B).

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**To: Helen W. Evans, Director, Dept. of Industrial Relations, Columbus, Ohio**  
**By: William J. Brown, Attorney General, June 15, 1978**

I have before me your request for my opinion on certain questions regarding the Board of Building Standards' authority to promulgate rules pursuant to R.C. 3781.06. You have requested my opinion as to the following:

1. Do "places of outdoor assembly" as defined in 4101:2-65 of the Ohio Building Code fall within the

definition of a "building" as set forth in 3781.06?  
Or has the Board of Building Standards exceeded its authority by promulgating these rules?

2. In one particular area of controversy, may the Board of Building Standards promulgate rules concerning tents?

R.C. 3781.10(A), requires the Ohio Board of Building Standards to:

Formulate and adopt regulations governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in Section 3781.06 of the Revised Code, including land area incidental thereto, the construction of industrialized units, the installation of equipment, the standards or requirements for materials to be used in connection therewith, and other requirements relating to the safety and sanitation of such buildings.

Because R.C. 3781.10 grants jurisdiction to the Board of Building Standards relative to the buildings specified in R.C. 3781.06, an answer to your questions first requires a determination of whether the definition of "places of outdoor assembly" contained in OAC §4101:2-65-01 is consistent with the definition of "building" as set forth in R.C. 3781.06.

R.C. 3781.06(B) provides as follows:

"A building" is any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances.

OAC 4101:2-65-01 defines a "place of outdoor assembly" as "a structure or enclosed area used for 'outdoor assembly' as defined in this section, and accommodating 200 or more persons". Since it is highly likely that such structures would be composed of girders, beams, floors, etc., or a combination thereof, I must conclude that to the extent that these structures do possess the necessary component parts as outlined in R.C. 3781.06(B), they may be regulated as "buildings" by the Board of Building Standards.

An answer to your second question requires an analysis of the term "tent". OAC §4101:2-65-01 defines a "tent" as:

". . . a shelter or structure, which is not an appendage to a building nor a roof structure, the covering of which is wholly or partly of canvas or other pliable material which is supported and made stable by standards, stakes, and ropes.

Under this definition, tents may be regulated as buildings if they have any of the components listed in R.C. 3781.06(B), *supra*. There appears to be no requirement that a "building" be permanent or that it be constructed with any particular type of material.

In specific answer to your questions, it is my opinion and you are so advised that:

1. The Ohio Board of Building Standards has jurisdiction over "places of outdoor assembly" which qualify by definition as "buildings" pursuant to R.C. 3781.06(B).

2. The Ohio Board of Building Standards has jurisdiction over "tents" which possess the requisite components to qualify as a "building" under R.C. 3781.06(B).

### OPINION NO. 78-042

#### Syllabus:

R.C. 3319.19 requires a board of county commissioners to provide telephone equipment in the offices of the county superintendent of schools. Telephone service, however, is an operating expense of the county board of education and must be included in its budget of operating expenses prepared pursuant to R.C. 3317.11.

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**To: Anthony G. Pizza, Lucas County Pros. Atty, Toledo, Ohio**  
**By: William J. Brown, Attorney General, June 23, 1978**

I have before me your request for an opinion regarding R.C. 3319.19. You indicate that while the section allows the county commissioners to provide heat, light, water, and janitorial service for the office of the county superintendent of schools, it does not include telephone service. You have, therefore, raised the following specific questions:

1. Does §3319.19, Ohio Revised Code, require the board of county commissioners to equip and pay for telephone service in the offices of the county superintendent of schools?
2. If the answer to question one is affirmative, how can such service be monitored by the board of county commissioners?
3. If the answer to question one is negative, who is responsible for the expense?

Telephone service is a type of operating expense incurred by the county board of education in the performance of its statutory duties. Operating expenses of the county board of education are generally provided for in R.C. 3317.11, which reads in pertinent part as follows:

Annually, on or before a date designated by the state board of education, each county board of education shall prepare a budget of operating expenses for the ensuing year for the county school district...and shall certify the same to the state board of education... Such budget shall consist of two parts. Part (A) shall include the cost of the salaries, employers retirement contributions, and travel expenses of supervisory teachers approved by the state board of education...Part (B) shall include the cost of all other lawful expenditures of the county board of education. The state board of education shall review such budget and may approve, increase or decrease such budget.

The county board of education shall be reimbursed by the state board of education from state funds for the

cost of part (A) of the budget...[and] for the cost of part (B) of the approved budget which is in excess of six dollars times the total number of pupils under the board supervision...for all the local school districts within the limits of such county school districts. The cost of part (B) not in excess of six dollars times the number of such pupils shall be apportioned by the state board of education among the local school districts in the county school district on the basis of the total number of such pupils in each such school district.

In absence of an express statutory provision to the contrary, a county board of education is, therefore, responsible for the payment of its operating expenses from funds allocated to it under R.C. 3317.11.

R.C. 3319.19 provides a limited exception to the general provisions set forth in R.C. 3317.11 in that it requires the board of county commissioners to assume responsibility for certain operating expenses of the county board of education. R.C. 3319.19 provides as follows:

The board of county commissioners shall provide and equip offices in the county for the use of the county superintendent of schools, and shall provide heat, light water, and janitorial services for such offices. Such offices shall be the permanent headquarters of the superintendent and shall be used by the county board of education when it is in session. Such offices shall be located in the county seat or upon the approval of the county board of education may be located outside of the county seat. (Emphasis added.)

As you indicate in your letter, a question similar to the one you pose was considered in 1959 Op. Att'y Gen. No. 141, p. 65. At the time that opinion was issued R.C. 3319.19 provided in pertinent part that "[t]he board of county commissioners shall provide and furnish offices in the county seat for the use of the county superintendent of schools." The opinion concluded that the term furnish as used in R.C. 3319.19 did not include the furnishing of janitorial services and such utilities as water, heat, light, and telephone. In response to the opinion, the General Assembly by enactment of Am. H.P. No. 869, effective November 9, 1959, amended R.C. 3319.19 to expressly require the board of county commissioners to provide heat, light, water and janitorial services for the superintendent's offices. Conspicuously absent from the amended version, however, is a specific provision for telephone service.

Since the authority of a board of county commissioners to act in financial matters must be strictly construed, State ex. rel. Lacker v. Menning, 95 Ohio St. 97 (1916), it is arguable that the absence of an express provision for telephone service in R.C. 3319.19 prohibits the provision of such service by the board. I would, in fact, adopt this conclusion had the General Assembly limited its revision of R.C. 3319.19 to the enumeration of certain utilities and services. The General Assembly, however, made an additional modification by providing that the board of county commissioners shall equip offices for the use of the superintendent. It is, therefore, necessary to consider if the duty to equip offices encompasses a duty to provide telephone service.

The word equip means "to fit up for a particular service of exigency", Star Distillery Co. v. Minolovitch Fletcher Co., 9 N. P. (n.s.) 218, 221 (1909), "to furnish for service, to provide with what is requisite for effective action." State v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., 13 N.P. (n.s.) 145, 149 (1912). The term equip is, therefore, quite broad and its use in R.C. 3319.19 evinces a legislative intent to have the board of county commissioners provide the superintendent with the requisites for a fully functional office.

Telephone equipment is by any standard essential office equipment.

Consequently, R.C. 3319.19 now requires the board of county commissioners to provide telephone equipment in the office of the superintendent. The provision of telephone equipment is, however, limited to the costs for the initial installation of the equipment and any necessary maintenance or replacement of the equipment.

Your question, on the other hand, refers to payment for telephone "service", which is a term of broader import and encompasses the cost of telephone usage. In my opinion R.C. 3319.19 does not impose a duty on the board of county commissioners to assume responsibility for the superintendent's telephone service expense. Telephone service is a type of operating expense. As noted previously, a county board of education is responsible, pursuant to R.C. 3317.11, for its operating expenses in absence of an express statutory provision to the contrary. While the duty to equip offices fairly implies a duty to install telephone equipment, it does not necessarily imply a duty to assume responsibility for the ongoing expense of telephone service.

It is, therefore, my opinion and you are so advised that R.C. 3319.19 requires a board of county commissioners to provide telephone equipment in the offices of the county superintendent of schools. Telephone service, however, is an operating expense of the county board of education and must be included in its budget of operating expenses prepared pursuant to R.C. 3317.11.

#### OPINION NO. 78-043

##### Syllabus:

- 1) The Superintendent of Insurance, under the terms of R.C. 1739.051, is authorized to retain attorneys, actuaries, accountants or other experts reasonably necessary to the hearing process for the purpose of presenting expert testimony at a hearing conducted thereunder.
- 2) A hospital service association involved in a hearing conducted pursuant to R.C. 1739.051 is obligated to meet the expenses incurred in the retention of such reasonably necessary expert witnesses, provided that any expenses thereby incurred may not exceed the sum fixed by the formula set forth in R.C. 1739.051.

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**To: Harry V. Jump, Director, Dept. of Insurance, Columbus, Ohio**  
**By: William J. Brown, Attorney General, June 23, 1978**

1. May the Department present its own witnesses at a public hearing held pursuant to Section 1739.051?
2. If your answer to (1) is in the affirmative, and the Department presents witnesses who are not employees of the Department, who must bear the expense of reimbursing such witnesses?

R.C. 1739.051 specifies a procedure to be followed when a hospital service association desires to take any of several actions, including the amendment of contractual relationships with hospitals or other health care facilities, the issuance or amendment of subscriber contracts, the establishment or change of any group

rating experience formula, and the establishment or change of any rate charged for any other subscriber contract. The procedure set forth in R.C. 1739.051 requires that a copy of any proposal concerning these actions be filed with the Superintendent of Insurance. The proposed contract, amendment, formula or rate shall not become effective until ninety days after filing unless the Superintendent gives his written approval before the expiration of ninety days.

R.C. 1739.051 further provides that where the Superintendent is not satisfied that every portion of any such contract, amendment, formula, or rate is lawful, fair and reasonable, he shall either so notify the association involved, which makes it unlawful for the association to go forward with the proposal, or shall set a date and time for a public hearing to commence no later than ninety days after filing.

R.C. 1739.051 provides for the conduct of such a hearing, in part, in the following terms:

The superintendent may retain at the association's expense such attorneys, actuaries, accountants, and other experts not otherwise a part of the superintendent's staff as shall be reasonably necessary to assist in the conduct of any public hearing under this section. Such expenses shall not exceed an amount equal to one one-hundredth of one per cent of the sum of premiums earned plus net realized investment gain or loss of such association as reflected in the most current annual statement on file with the superintendent. Any person retained shall be under the direction and control of the superintendent and shall act in a purely advisory capacity. The superintendent shall, within thirty days after the commencement of a hearing issue an order approving any proposed contract, amendment, formula, or rate if he finds it to be lawful, fair, and reasonable, or approving only that portion of a proposed contract, amendment, formula, or rate which he finds to be lawful, fair, and reasonable, or disapproving any proposed contract, amendment, formula, or rate if he finds it otherwise, or withdrawing his approval of any existing contract, amendment, formula, rate, or any portion thereof on any of the grounds stated in this section. Any action by the superintendent following a public hearing shall be effected by written order which shall state the grounds for disapproval.

Any action taken or order issued by the superintendent pursuant to this section may be appealed by the association as provided for in section 119.12 of the Revised Code.

It is apparent, under the terms of R.C. 1739.051, that the Superintendent is authorized to retain certain experts and that a hospital service association involved in a proceeding thereunder is responsible, subject to the limits outlined above, for the expense of retaining the experts necessary for the conduct of the hearing. Your questions, therefore, center upon a determination of whether the giving of testimony and evidence may be characterized, under the terms of R.C. 1739.051, as assisting in the conduct of a hearing.

While experts such as actuaries and accountants might be useful to a hearing in some other capacity, the usefulness of such experts in a proceeding such as that prescribed under R.C. 1739.051 lies primarily in the evaluation and assessment made possible by the application of unique, professional skills. Because the reason, intent and spirit of law will generally prevail over the literal import of the terms employed, *Slater v. Cave*, 3 Ohio St. 80 (1853), I am of the opinion that the terms of R.C. 1739.051 authorize the Superintendent to retain experts as witnesses in a hearing thereunder. While participation as a witness may not, in the strictest sense, be characterized as participation in the "conduct" of a hearing, it is clear

that the fact-finding function served by a hearing under the terms of R.C. 1739.051 is assisted and enhanced by professional, expert analysis and evaluation of the issues involved. Moreover, I am of the opinion that retention of such experts for the purpose of giving expert testimony is precisely the purpose contemplated by the General Assembly in the adoption of the statutory provisions set forth above.

You have, however, also inquired as to where the responsibility for compensating such witnesses lies. Under the terms of R.C. 1739.051 set forth above, the cost of experts reasonably necessary to assist in the conduct of a hearing not otherwise a part of the Superintendent's staff is to be borne by the association involved, provided that expenses thereby incurred may not exceed the sum fixed by the statutory formula set forth above. Consequently, it is my opinion, and you are so advised that:

- 1) The Superintendent of Insurance, under the terms of R.C. 1739.051, is authorized to retain attorneys, actuaries, accountants or other experts reasonably necessary to the hearing process for the purpose of presenting expert testimony at a hearing conducted thereunder.
- 2) A hospital service association involved in a hearing conducted pursuant to R.C. 1739.051 is obligated to meet the expenses incurred in the retention of such reasonably necessary expert witnesses, provided that any expenses thereby incurred may not exceed the sum fixed by the formula set forth in R.C. 1739.051.

#### OPINION NO. 78-044

##### Syllabus:

The Director of Administrative Services has the authority, pursuant to R.C. 124.07, to appoint persons not in the employ of the department, including officers or employees of other state agencies or county government, to administer civil service examinations under his direction. (1965 Op. Att'y Gen. No. 65-108 modified).

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**To: Richard D. Jackson, Dept. of Administrative Services, Columbus, Ohio**

**By: William J. Brown, Attorney General, June 27, 1978**

I have before me your request for my opinion concerning the authority of the Director of Administrative Services to delegate to officers or employees of other state agencies or county government the responsibility for administering civil service examinations prepared by the Department of Administrative Services. You state that in performing the test administration, the officers or employees of these other agencies shall use their own facilities. All other functions relating to the testing process, such as grading the examinations and preparing eligible lists, shall continue to be exclusively performed by employees of the Department of Administrative Services.

The duty of the Director of Administrative Services to conduct civil

examinations is set forth in R.C. 124.04, which provides in pertinent part as follows:

The powers, duties and functions of the department of administrative services not specifically vested in and assigned to, or to be performed by, the state personnel board of review are hereby vested in and assigned to, and shall be performed by the director of administrative services, which powers, duties and functions shall include, but shall not be limited to the following powers, duties and functions:

- (A) To prepare, conduct, and grade all competitive examinations for positions in the classified state service;
- (B) To prepare, conduct and grade all non-competitive examinations for positions in the classified state service;
- (C) To prepare eligible lists containing the names of persons qualified for appointment to positions in the classified state service;

. . . .

- (J) To appoint such examiners, inspectors, clerks and other assistants as are necessary in the exercise of the powers and performance of the duties and functions which the director is by law authorized and required to exercise and perform and to prescribe the duties of all such employees. (Emphasis added).

The authority of the Director of Administrative Services to delegate his responsibility to conduct civil service examinations to persons not in the employ of the department was considered by one of my predecessors in 1965 Op. Att'y Gen. No. 65-108. The syllabus of the opinion states that the director may delegate this responsibility only to those employees who are directly responsible to him. The basis for this conclusion is the following interpretation of R.C. 143.013, now R.C. 124.04, set forth in the opinion at 2-231:

It is clear from [R.C. 143.013] that the legislature has designated the Director of State Personnel as the public official responsible for [the conduct of civil service examinations]. It is equally clear that he must have control over the examination process from beginning to end. In Section 143.013(J), Revised Code the legislature made provision for delegating some of the Director's authority to examiners, etc., as may be necessary. But the Director of State Personnel must retain control of the examination process as administered by the examiners and the examiners must be responsible to the Director. This is reflected by the fact that the legislature has given the Director the power to delegate authority only to his employees.

While I concur with my predecessor's analysis of R.C. 143.013 I cannot accept it as dispositive of the issue. R.C. 124.07, set forth in pertinent part below, also empowers the Director of Administrative Services to appoint examiners and other assistants.

The director of administrative services shall appoint such examiners, inspectors, clerks and other assistants as are necessary to carry out sections 124.01 to 124.64 of

the Revised Code. The director may designate persons in or out of the official service of the state to serve as examiners or assistants under his direction who shall receive such compensation for each day actually and necessarily spent in the discharge of their duties as examiner or assistant as is determined by the director; provided if any such examiner or assistant is in the official service of the state, or any political subdivision thereof, it shall be a part of his official duties to render such services in connection with the examination without extra compensation. (Emphasis added).

This statute expressly authorizes the director to appoint persons not in the employ of the department as examiners and also permits the director to compensate such individuals if they are not in the official service of the state. The only qualification contained in the statute is that the appointees serve under the direction of the Director of Administrative Services.

It is, therefore, my opinion and you are so advised that the Director of Administrative Services has the authority, pursuant to R.C. 124.07, to appoint persons not in the employ of the department, including officers or employees of other state agencies or county government, to administer civil service examinations under his direction. (1965 Op. Att'y Gen. No. 65-108 modified).

Opinions for October 1978  
Advance Sheets will commence  
on following page 2-105

**OPINION NO. 78-045****Syllabus:**

1. A board of park commissioners is authorized by R.C. 1545.11 to purchase land with borrowed funds for which a promissory note secured by a first mortgage on the subject property is given to the lender.
2. The principal and interest on such notes may be paid from tax revenue payable to a park district pursuant to R.C. 1545.20.

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**To: Richard A. Yoss, Monroe County Pros. Atty., Woodfield, Ohio**  
**By: William J. Brown, Attorney General, July 7, 1978**

I have before me your request for my opinion which reads in pertinent part as follows:

1. Does Ohio Revised Code Section 1545.11 permit the Park Board to purchase land and borrow purchase money on promissory notes secured by first mortgages on the real estate purchased?
2. If the answer to Question No. 1 is 'Yes,' may the principal and interest on said notes be paid from general tax revenue payable to the Park District? (Such revenue consists of a one-half mill inside the ten mill limitation and placed on the tax duplicates by the Park Board without vote of the people.)

Your first question concerns the authority of a park district to purchase land with borrowed funds for which a promissory note secured by a first mortgage on the subject property is given to the lender. R.C. 1545.11 specifically authorizes a board of park commissioners of a park district created prior to April 16, 1920 to acquire land. That section provides, in pertinent part that:

The board of park commissioners may acquire lands either within or without the park district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, and to those ends may create parks, parkways, forest reservations, and other reservations and afforest, develop, improve, protect, and promote the use of the same in such manner as the board deems conducive to the general welfare. (Emphasis added)

R.C. 1545.11 further provides, in part:

Such lands may be acquired by such board, on behalf of said district, (1) by gift or devise, (2) by purchase for cash, by purchase by installment payments with or without a mortgage, by entering into lease-

purchase agreements, by lease with or without option to purchase, or, (3) by appropriation.

. . . .

This section applies to districts created prior to April 16, 1920. (Emphasis added)

Thus, there appears to be no question, under the terms of R.C. 1545.11, that a board of park commissioners of a park district created prior to April 16, 1920 is authorized to purchase land by installment payments with a mortgage. However, further analysis is necessary in determining whether the portions of R.C. 1545.11 set forth above may be said to authorize a board created after April 16, 1920, to acquire land as provided therein.

As originally enacted G.C. 2976-7, the predecessor of R.C. 1545.11, authorized the commissioners of a park district to acquire lands within the district for the conservation of the natural resources of the district. H.B. No. 183, 197 Ohio Laws 65. However, in 1920, under the provisions of H.B. No. 387, 108 Ohio Laws 1097, the powers of a board of park commissioners were expanded. The provisions of G.C. 2976-7, now R.C. 1545.11, were expanded to permit a board to acquire lands either within or without the district for conversion into forest reserves or for the conservation of the natural resources of the state. G.C. 2976-7 was at that time also amended to specify that the provisions of the section were to apply to districts created before the effective date of H.B. No. 387. In 1929, the powers of the board were again expanded under the terms of G.C. 2976-7. H.B. No. 75, 113 Ohio Laws 659. In 1953 the provisions of S.B. No. 361, 125 Ohio Laws 903, 930 were enacted as an emergency measure designed to become effective as a corrective amendment on October 1, 1953, the date the Revised Code took effect. As the result of this amendment, the language of G.C. 2976-7 which had specified that "the provisions of this section shall apply to districts heretofore created" was altered so that the final sentence of the new R.C. 1545.11 provided, "This section applies to districts created prior to April 16, 1920."

From this legislative history, it is apparent that the last sentence of what is now R.C. 1545.11 was originally added to G.C. 2976-7 in 1920 to ensure that park districts created prior to the 1920 effective date of H.B. No. 387 enjoyed the broader powers conferred upon boards of park commissioners thereunder. This statutory provision was, of course, necessitated by the historic presumption applied by the courts of this state that the legislature intends statutes enacted by it to operate prospectively rather than retroactively. State, ex rel Moore Oil Co. v. Daoben, 99 Ohio St. 406 (1919); Batchelor v. Newness, 145 Ohio St. 115 (1945); Smith v. Ohio Valley Ins. Co., 27 Ohio St.2d 268 (1971); see also, R.C. 1.48. It is apparent, therefore, that the change in language in 1953 which set forth the specific date of April 16, 1920, in no way altered the operation of this final provision as one which included districts created both before and after that date. Thus, I am of the opinion that the terms of R.C. 1545.11 authorize boards of park commissioners created both before and after April 16, 1920, to acquire lands as specified therein.

Your second question concerns whether the principal and interest due on a mortgage note may be paid from the tax revenue of the one-half mill tax inside the ten mill limitation placed on the tax duplicates by the park board without a vote of the people. R.C. 1545.20 provides in pertinent part:

A board of park commissioners may levy taxes upon all the taxable property within the park district in an amount not in excess of one half of one mill upon each dollar of the assessed value of the property in the district in any one year, subject to the combined maximum levy for all purposes otherwise provided by law. (Emphasis added)

Accordingly, tax revenue generated from such a levy may be used for any purpose for which the board is authorized by law to expend funds. Since R.C.

1545.11 specifically authorizes a park board to acquire land by mortgage purchase, revenue generated by a R.C. 1545.20 levy may be used for such an acquisition.

Therefore it is my opinion and you are so advised that:

1. A board of park commissioners is authorized by R.C. 1545.11 to purchase land with borrowed funds for which a promissory note secured by a first mortgage on the subject property is given to the lender.
2. The principal and interest on such notes may be paid from tax revenue payable to a park district pursuant to R.C. 1545.20.

### OPINION NO. 78-046

#### Syllabus:

A joint county community mental health and retardation board may contract for and acquire by purchase real property in its own name, provided that the acquisition serves a purpose authorized by statute.

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**To: Timothy B. Moritz, M.D., Director, Dept. of Mental Health and Mental Retardation, Columbus, Ohio**

**By: William J. Brown, Attorney General, July 14, 1978**

I have before me your request for my opinion which reads as follows:

May a joint-county district community mental health and retardation board, established pursuant to R.C. Chapter 340, contract for and acquire by purchase real property for a mental health or retardation facility in the board's own name for statutory purposes?

As noted in your letter, I recently had occasion, in 1977 Op. Att'y Gen. 77-057, to consider the question of whether a single county community mental health and retardation board is authorized to purchase real property. It was my conclusion in the Opinion that the power to purchase real property for a mental health or retardation facility is, under the terms of R.C. 307.02, reserved to the board of county commissioners. Consequently it was my conclusion that a single county community mental health and retardation board has neither the express nor the implied power to purchase real property in its own name. Your question, however, arises as to the authority of the board of a joint county community mental health and retardation service district to directly acquire real property for mental health or retardation facilities.

While, under the terms of R.C. 340.03, the duties of a single county mental health and retardation board and those of a joint board are identical, there are several fundamental differences in their structures. R.C. 340.01 provides for the creation of community mental health and mental retardation service districts comprising any county or combination of counties having a population of at least fifty thousand. Where a single county has a population of at least fifty thousand, under the terms of R.C. 340.01, a single county district arises. Where the fifty thousand base is combined from the population of more than one county, a joint county district is created.

For the purpose of taxation, a single county community mental health and service district does not enjoy status distinct from the county it serves. The board of a single county district is not a taxing authority under the terms of R.C. 5705.01. Tax levies for the use of a single county district require action by the board of county commissioners as the taxing authority for the county. In contrast, R.C. 5705.01(A) specifies that for the purposes of R.C. Chapter 5705, a joint county mental health and retardation service district is a subdivision. Thus, a joint county board is, for the purposes of taxation, an entity independent of the counties which comprise it. R.C. 5705.01(C) specifies the board of a joint county community mental health and retardation district as the taxing authority for the district. R.C. 5705.03 empowers the taxing authority of each subdivision to levy taxes annually for the purpose of meeting current expenses and acquiring or constructing permanent improvements. Under the terms of R.C. 5705.01, a permanent improvement includes land and interests therein. While I am of the opinion that the power to purchase real property for the use of a single county board is reserved to the board of county commissioners, I must conclude that the terms of R.C. 5705.01 and 5705.03 vest the authority to acquire real property for the use of a joint county community mental health and retardation service district in the board of the district.

Therefore, in specific answer to your question, it is my opinion and you are so advised, that a joint county community mental health and retardation board may contract for and acquire by purchase real property in its own name, provided that the acquisition serves a purpose authorized by statute.

#### OPINION NO. 78-047

##### Syllabus:

- 1) A community mental health and retardation board, established pursuant to R.C. 340.02, may not take formal action at a regular or special meeting of the board, if less than a majority of the members of the board are present.
- 2) A majority of the members of a community health and retardation board constitutes a quorum, provided all members had notice of and an opportunity to be present at the meeting, and an action taken by a majority of the quorum constitutes formal action of the board.

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**To: Timothy B. Moritz, M.D., Director, Dept. of Mental Health and Mental Retardation, Columbus, Ohio**

**By: William J. Brown, Attorney General, July 14, 1978**

I have before me your request for my opinion regarding the operating procedures of community mental health and retardation boards established pursuant to R.C. Chapter 340. Your specific questions are as follows:

1. May a community health and retardation board take formal action at a regular or special meeting of the board when less than a majority of board members are present at the meeting?
2. May less than a majority of board members of a community mental health and retardation board constitute a quorum for a regular or special meeting?

3. If a majority of board members of a community mental health and retardation board constitutes a quorum for a regular or special meeting, may formal board action occur upon a majority vote of the members constituting the quorum?

Your first two questions may be combined, since a quorum is "such a number of the members of a body as is competent to transact business in the absence of the other members." State ex rel. Cline v. Wilkesville Township, 20 Ohio St. 288, 294 (1870).

Under general principles of common law, if a body has a limited number of members, a majority of this limited number constitutes a quorum, in the absence of a statute or charter or bylaw provision to the contrary, and a majority of a quorum is empowered to act for the body. These principles are aptly illustrated in Federal Trade Commission v. Flotill Products, Inc., 389 U.S. 179, 88 S.Ct. 401, 19 L. Ed. 2d 398 (1967).

The facts precipitating the litigation involved a complaint that Flotill Products had violated §2(C) of the Robinson Patman Act. All five members of the Federal Trade Commission heard oral argument in the case. Two commissioners, however, retired before the Commission rendered its decision. Two of the three participating commissioners concurred that Flotill Products, Inc. had violated §2(C) of the Act. The Court of Appeals for the Ninth Circuit refused to enforce the Commission's cease-and-desist order and held that absent statutory authority to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the Commission. The United States Supreme Court reversed the judgment of the court of appeals, stating at 389 U.S. 183 as follows:

Inssofar as the Court of Appeals' holding implies that the proposition stated by it is the common law rule, the court was manifestly in error. The almost universally accepted common-law rule is the precise converse -- that is, in the absence of a contrary statutory provision, a majority of quorum constituted of a simple majority of a collective body is empowered to act for the body.

One of the cases noted by the Supreme Court as illustrative of the common-law rule is State ex rel. Green v. Edmondson, 12 N.P. (n.s.) 577 (Hamilton County Common Pleas, 1912), which held that in absence of a different provision in the statute, a county building commission is governed in the conduct of its business by ordinary methods and parliamentary rules. The court stated at 588 the following general rule:

The commission consists of seven members, each member having equal power and authority. The commission itself is charged with certain duties involving the exercise of judgment and discretion by each of its members. The statute does not specifically provide for its necessary organization. The general rule applicable to boards, commissions, and similar bodies and entities of a definite membership therefore applies, unless the statute otherwise specifically provides, to-wit, that a quorum consists of a majority of its members, and that such quorum, due notice having been given of the time and place of the meeting to all members, can exercise the power of the commission; and further, that a majority of such quorum is the action of the body or commission.

See also, Slavens v. State Board of Real Estate Examiners, 166 Ohio St. 285, 286 (1957) ("Where authority has been conferred upon an administrative board consisting of three or more members and where at a particular meeting one or more members

of the board are absent, such board, in the absence of statutes to the contrary, may act through a majority of quorum consisting of a majority of the members, providing all members had notice and an opportunity to be present.")

It is, therefore, clear that unless R.C. Chapter 340 provides to the contrary, a quorum of a community mental health and retardation board consists of a simple majority of the board and a majority of a quorum may act for the board, provided all members had notice of and an opportunity to be present at the meeting.

R.C. 340.02, which provides for the creation of a community mental health and retardation board, reads in pertinent part as follows:

For each community mental health and retardation service district or joint-county district there shall be appointed a mental health and retardation board having not less than nine members, if a single county board, or not less than thirteen members, if a joint-county board, nor more than fifteen members. The chief of the division of mental health, with the approval of the director of mental health and mental retardation, shall appoint one-third of the members of such board, and the board of county commissioners shall appoint the remaining members of the board. In a joint-county district the chief, with the approval of the director, shall appoint one-third of the members of such board, and the county commissioners of each participating county shall appoint the remaining members to the board in as nearly as possible the same proportion as that county's share bears to the total of funds expended from all participating counties for the mental health and retardation services approved by the director.

At least two members of the board shall be practicing physicians, one of whom shall be either a psychiatrist or pediatrician, if possible, and at least one member shall be a probate judge of a participating county or his designee. Members shall be residents of the county or counties and knowledgeable and interested in mental health and mental retardation programs and facilities.

The statute also provides for the term of membership on the board and the procedure for filling vacancies and for removal of members. The statute does not, however, set forth requirements for a quorum or for voting.

R.C. 340.03, which sets forth the duties of the board, also is relevant to the issues you raise. R.C. 340.03(L) set forth below, authorizes a community mental health and retardation board to establish its own operating procedures. Similarly, R.C. 340.03(M), set forth below, authorizes the board to establish such rules as may be necessary to carry out the provisions of R.C. Chapter 340.

Subject to rules and regulations of the director of mental health and mental retardation, the community mental health and retardation board, with respect to its area of jurisdiction, and except for training center and workshop programs and facilities conducted pursuant to Chapter 5127 of the Revised Code, shall:

....

(L) Establish the operating procedures of the board and submit an annual report of the programs under the jurisdiction of the board, including a fiscal accounting, to the board of county commissioners.

(M) Establish such rules and regulations or standards and perform such other duties as may be necessary or proper to carry out Chapter 340 of the Revised Code.

It is, therefore, necessary to determine whether the discretionary power conferred on the board by these sections includes the authority to determine a quorum standard different from the common law rule.

It is a settled rule of statutory construction that the General Assembly will not be presumed to have abrogated a rule of common law unless the language used in a statute clearly expresses such intention. There is no abrogation of the common law by mere implication. State ex rel. Hunt v. Fronizer, 77 Ohio St. 7 (1907); Frantz v. Maher, 106 Ohio App. 465 (1957); State ex rel. Wilson v. Board of Education, 102 Ohio App. 541 (1956). Where the General Assembly has altered the common law quorum and voting requirements, it has done so expressly. See e.g. R.C. 705.15 (A majority of all members of the legislative authority of a municipal corporation constitutes a quorum, but the affirmative vote of a majority of the members of the legislative authority is necessary to adopt any motion, resolution or ordinance. The rule requiring every ordinance to be read three times may be suspended by a three-fourths vote of all members); R.C. 3319.01 (A local board of education, by a three-fourths vote of its full membership, may employ a person not nominated by the county superintendent as superintendent).

The authority of a community mental health and retardation board to establish operating procedures and such rules as may be necessary to carry out the provisions of R.C. Chapter 340 does not clearly express a legislative intent to abrogate the common law standard for determining a quorum. I must, therefore, conclude that no such abrogation is intended.

Accordingly, it is my opinion and you are so advised that:

- 1) A community mental health and retardation board, established pursuant to R.C. 340.02, may not take formal action at a regular or special meeting of the board, if less than a majority of the members of the board are present.
  
- 2) A majority of the members of a community health and retardation board constitutes a quorum, provided all members had notice of and an opportunity to be present at the meeting, and an action taken by a majority of the quorum constitutes formal action of the board.

#### OPINION NO. 78-048

#### Syllabus:

1. No person who is a member of any board of education may be appointed or reappointed to the position of trustee of a technical college under R.C. 3357.05.
2. A person who held the positions of trustee of a technical college district and member of a board of education prior to January 13, 1978 may, pursuant to R.C. 3357.05, continue to hold both positions, but may not accept a new term in either position without first resigning from the other.

3. A person who is a trustee of a technical college may not subsequently be elected or appointed to the position of member of the board of education without first resigning his trusteeship.

**To: William Coulter, Acting Chancellor, Board of Regents, Columbus, Ohio**

**By: William J. Brown, Attorney General, July 24, 1978**

I have before me your predecessor's request for my opinion which involves R.C. 3357.05 as amended by Am. H.B. 399 (effective 1-13-78). The relevant portion of the statute, now reads as follows:

Within ninety days after a technical college district is created...trustees shall be appointed to serve as a board of trustees of the technical college district. Appointees shall be qualified electors residing in the technical college district and shall not be employees of any governmental agency. No new trustee may be appointed who is a member of any board of education... (New language emphasized.)

Therefore, you have raised the following questions:

1. Do appoint and reappoint mean the same; that is, can an individual presently serving on the board of trustees of a technical college, who is also a member of a board of education be reappointed as a trustee for a new term?
2. Does this new law imply that a member of a board of trustees, who is subsequently selected as a member of a board of education, be required to resign as a trustee.
3. It is my understanding that most members of boards of education receive some remuneration for services to the board. Does this Section of 3357, prohibiting employees of governmental agencies from becoming trustees, automatically exclude members of boards of education because of the money they receive? I am of the opinion that a previous interpretation of this law prohibits staff members of public schools from serving because of this provision.

R.C. 3357.05, *supra*, is, as you indicate in your first question, a statute subject to two possible interpretations. Under one reading of the newly amended act, no person may be appointed as trustee of a technical college if he is a member of any board of education, even if he is currently a trustee. Another reading would permit reappointment of trustees even though they concurrently serve on a board of education, but would prevent appointment of a "...new trustee..." who holds the other office. Because of these possible interpretations, the statute is ambiguous, and therefore, R.C. 1.49 should be applied.

R.C. 1.49 establishes guidelines for the distillation of legislative intent. It provides:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be obtained;

- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

As indicated, R.C. 3357.05 was recently amended. Where formerly the statute made only the general prohibition against trustees being "...employees of any governmental agency...", the statute now specifically prohibits appointment of any new trustee who is on any board of education. The object of the statute is clear in one respect. It seeks to keep members of a board of education off the board of trustees. This amendment appears to recognize the likelihood that the two offices are in fact incompatible under the traditional common law test of incompatibility of offices. That test, often cited by holders of this office, was set forth in State, ex rel. Attorney General, v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909) as follows:

Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both. (Emphasis added.)

Since, under R.C. 3357.05(A), a majority of the trustees of a technical college district are to be selected by the various boards of education within the district, it is clear that the office of trustee is "subordinate" to the office of board of education member. I find additional support in this conclusion by virtue of the fact that board of education members and technical college trustees must be residents of their respective districts, and that therefore members of a board of education could appoint themselves trustees. Moreover, under R.C. 3357.09(M) the trustees of a technical college may contract with boards of education to allow the use of its facilities by various school districts. This would place a member of both bodies in an obvious conflict.

Returning to R.C. 1.49, it must be presumed that the General Assembly was cognizant of the incompatibility of the two offices when it enacted Am. H.B. No. 399 to amend R.C. 3357.05, and therefore the various factors to be considered in resolving ambiguity under R.C. 1.49 fall easily into place. The only construction of R.C. 3357.05 which is reasonable is that after the effective date of Am. H.B. 399, no appointee to the office of technical college trustee may be a member of any board of education, regardless of whether the appointee is currently a trustee of the technical college or not. Simply put, under R.C. 3357.05 "appoint" is synonymous with and includes "reappoint."

Your second question involves the practical result of the amendment to R.C. 3357.05 as set forth in Am. H.B. 399. If a technical college trustee is elected to serve on a board of education, you ask whether he must, at that point, resign his trusteeship. The statute speaks only to the reverse situation, *i.e.* where a board member is to be appointed as a trustee. In that instance, it seems clear that he must, in fact, resign in order to be appointed as trustee. Under Ohio case law, if one person is appointed to an office which is incompatible with an office he already holds, then he automatically vacates the first office. State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963). To apply this result blindly to the situation you describe would, I think, contravene the intention of the legislature. It seems that the General Assembly has, through Am. H.B. No. 399, stated that only at time of appointment as trustee must a board member choose which office he will hold. If he opts for the trusteeship he must resign his board of education membership. However, to allow a trustee to affirmatively seek the office of board of education member, after the effective date of the act also contravenes the intent of the legislature that one person may not hold both offices. Therefore, in answer to your second question, if a member of a Board of Education also held the position of

technical college trustee prior to the effective date of Am. H.B. No. 399, (1-13-78) he may not be reappointed as a trustee but he need not resign either position. However, after the effective date of the act, no trustee may be elected or appointed as a Board of Education member while retaining the trusteeship.

My response to your first two questions renders specific treatment of your third question unnecessary. This is so because of the axiom of statutory construction that the specific part of a statute controls over the general. Moreover, members of a board of education are not "employees" in the traditional sense. Rather they are officers since they are not subject to control in the manner in which they execute their duties.

Accordingly, it is my opinion, and you are hereby advised that:

1. No person who is a member of any board of education may be appointed or reappointed to the position of trustee of a technical college under R.C. 3357.05.
2. A person who held the positions of trustee of a technical college district and member of a board of education prior to January 13, 1978 may, pursuant to R.C. 3357.05, continue to hold both positions, but may not accept a new term in either position without first resigning from the other.
3. A person who is a trustee of a technical college may not subsequently be elected or appointed to the position of member of the board of education without first resigning his trusteeship.

#### OPINION NO. 78-049

##### Syllabus:

An employer is permitted to "pick up" part or all of the teacher contributions required to be made to the State Teachers Retirement System pursuant to R.C. 3307.51.

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**To: James L. Sublett, Executive Director, State Teachers Retirement System, Columbus, Ohio**  
**By: William J. Brown, Attorney General, August 25, 1978**

I have before me your request for my opinion on the following question:

May an employer "pick up" part or all of the teacher contributions to the State Teachers Retirement System?

Your request follows the announcement of Rev. Rul. 77-462. In that ruling, the Internal Revenue Service declared that when an employer-school district "picks up" (assumes and pays) required teacher contributions to a pension plan, qualified under §§401(a) and 501(a), Internal Revenue Code of 1954, that payment would not be included as income to the employee until distribution of the benefits upon retirement or termination, pursuant to §402(a). But while Rev. Rul. 77-462 identifies the federal tax consequences of such a payment, it does not address the question of whether such a payment is authorized under Ohio law.

Teacher contributions to the State Teachers Retirement System (STRS) are required by R.C. 3307.51, which states in relevant part:

Each teacher who is a member of the state teachers retirement system shall contribute eight percent of his earned compensation to the teachers savings fund.... Such contribution shall be deducted by the employer in an amount equal to the applicable percent of such contributor's paid compensation... [Emphasis added.]

Thus, the question of whether an employer may "pick up" employee contributions to STRS depends upon the meaning of the phrase ". . . shall contribute eight percent of his earned compensation . . ."

Teachers, professors and others eligible to participate in STRS, by statute, have their rate of compensation fixed by their boards of education or trustees. See, e.g., R.C. 3317.14 (empowers boards of education to fix compensation, subject to prescribed minimum rates, for their teaching employees); and R.C. 3335.09 (permits board of trustees of Ohio State University to determine compensation of faculty members). Compensation is not limited to direct cash payments to an employee. As the Supreme Court noted in State, ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391, while discussing Ohio Const., Art. II, §20,:

Fringe benefits . . . are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and then transmitted to the insurance company. Such payments for fringe benefits may not constitute "salary" in the strictest sense of the word, but they are compensation.

Thus, it is of no moment whether employees are paid for their services through a weekly paycheck, fringe benefits, or a combination thereof. Such payments and benefits are compensation. Similarly, an employee contributes to a pension plan from his compensation, whether such contribution is deducted from his weekly paycheck or whether the employer "pays" it for him. The mode of payment is not controlling, for, ultimately, the payment is made out of the employee's compensation. Accordingly, the employee subject to STRS contribute eight percent of his compensation to the system even though his employer "picks up" such payments. I conclude, therefore, that an employer is permitted to "pick up" part or all of the teacher contributions to STRS.

Accordingly, it is my opinion, and you are so advised, that an employer is permitted to "pick up" part or all of the teacher contributions required to be made to the State Teacher's Retirement System pursuant to R.C. 3307.51.

## OPINION NO. 78-050

### Syllabus:

1. A county welfare department is an "office" of a "taxing district" for the purposes of R.C. 117.01, and is therefore subject to examination by the Auditor of State through the Bureau of Inspection and Supervision of Public Offices.
2. Under R.C. 117.15, the county auditor, as fiscal officer of the taxing district, may charge the fund of the county welfare department for the costs of an

examination of that department conducted by the Bureau of Inspection and Supervision of Public Offices.

**To: Kenneth B. Creasy, Director, Dept. of Public Welfare, Columbus, Ohio**  
**By: William J. Brown, Attorney General, August 25, 1978**

I have before me your request for my opinion regarding audits of county welfare departments conducted by the Auditor of State through the Bureau of Inspection and Supervision of Public Offices. Specifically, you have raised the following questions:

1. Is a county welfare department subject to an audit by the Auditor of State pursuant to the provisions of Chapter 117 of the Revised Code, specifically, or if not that Chapter, by what statutory grant of power is such a right conferred?
2. Is a county welfare department a "taxing district" as used in section 117.15, Ohio Revised Code, so that costs of an audit may be charged to the county welfare department? If not, by what statutory grant of power is the auditor empowered to assess the costs of an audit against the fiscal accounts of a county welfare department?

The Bureau of Inspection and Supervision of Public Offices (hereinafter the Bureau) is created by R.C. 117.01. That section also enumerates the powers and duties of the Bureau. It provides in part:

This section creates the bureau of inspection and supervision of public offices, in the office of the auditor of state, which bureau shall inspect and supervise the accounts and reports of all state offices as provided in sections 117.01 to 117.19, inclusive, of the Revised Code, including every state educational, benevolent, penal, and reformatory institution, public institution, and the offices of each taxing district or public institution in the state . . . (Emphasis added)

The problem thus presented is whether a "county" is a "taxing district," as it is clear that a county welfare department is an "office" of the county. See, R.C. 329.01 et seq.

Whether or not a county is a "taxing district" is a matter of some confusion. The only statutory definition of the term is found in R.C. 5711.01 (E). It provides:

As used in section 5711.01 to 5711.36, inclusive, of the Revised Code:

. . .

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

By its own terms, however, this definition is limited to R.C. Chapter 5711., and when applied to R.C. 117.01 is of limited value.

Within the various sections which comprise R.C. Chapter 117., there are several instances where a distinction is made between counties and taxing districts. Thus, in R.C. 117.06, the following language is found:

A financial report of each public institution or taxing district for each fiscal year shall be made [to the bureau.]

. . .

Any public institution or taxing district whose financial report is not filed at the time required by this section shall pay the auditor of state twenty-five dollars for each day the report remains unfiled . . . If funds are withheld from a county because of the failure of taxing district located within the county or any portion of which is so located to file, the county may deduct the amount of penalty from property tax revenue due the delinquent district.

And, R.C. 117.18 contains the following language:

The bureau . . . may require financial reports from any county, political subdivision, or taxing district showing the condition of all appropriation accounts . . .  
 . (Emphasis added.)

See also, R.C. 117.15, *infra*. While it is not entirely clear from the statutes just what a "taxing district" includes, the language in R.C. 117.16 and R.C. 117.18 cited, *supra*, indicates that the terms "taxing district" and "county" are not synonymous. In fact, in 1969 Op. Att'y Gen. No. 69-047, my predecessor had occasion to interpret R.C. 117.06, and concluded that a county was not a taxing district.

There is, however, some authority to support the view that the term "taxing district" includes counties. In *State ex rel. Guilbert v. Shumate*, 72 Ohio St. 487 (1905), the Supreme Court was confronted with the constitutionality of the provisions, now contained in R.C. 117.15, which provide that the costs of audits conducted by the bureau be charged to the taxing district which was the subject of the audit. The case was an action in mandamus, brought by the auditor of state, against a county auditor. The court, in deciding the case, never actually confronted the issue, but merely assumed that a county was a taxing district. A similar result is found in 1956 Op. Att'y Gen. No 6184, p. 22, which dealt with R.C. 117.01 and county law library associations. The provision of that section under consideration was as follows:

The bureau may examine the accounts of every private institution, association, board, or corporation receiving public money for its use, . . . The expense of such examination shall be borne by the taxing district providing such public money.

My predecessor concluded that the county, which provided funds for the association, was responsible for the costs of examination, again assuming that a county is a "taxing district."

In resolving this conflicting authority it is important to keep in mind the intent of the legislature, for that is the goal of all matters involving construction of statutes. *Carter v. Youngstown*, 146 Ohio St. 203 (1946). The Ohio Supreme Court, in *State ex rel. Smith v. Maharry*, 97 Ohio St. 272 (1918) has found that the provisions of R.C. 117.01 are remedial, and therefore should be liberally construed and applied to effect their clear and controlling purpose to protect and safeguard public property and public monies. Keeping this admonition in mind, and considering the ease with which the Supreme Court in *Shumate*, *supra*, found that a county was a taxing district for the purposes of R.C. Chapter 117, I must conclude

that the term "taxing district" as used in R.C. 117.01 includes counties. Therefore, in answer to your first question, it is my opinion that a county welfare department is subject to an audit and examination by the Bureau as an "office" of a "taxing district" under R.C. 117.01.

Your second question concerns R.C. 117.15. That section provides, in pertinent part, as follows:

The necessary expenses of the maintenance and operation of the administrative office of the bureau of inspection and supervision of public offices shall be financed from the general revenue fund of the state through biennial appropriations by the general assembly. The total amount of compensation paid state examiners, their expenses, and the cost of typing reports shall be borne by the taxing districts to which such state examiners are . . . assigned . . . The auditor of state shall certify the amount of such compensation, expenses, and typing to the county auditor of the county in which the taxing district is located. The county auditor shall forthwith issue his warrant in favor of the auditor of state or the county treasurer who shall pay it from the general fund of the county, and the county auditor shall charge the amount so paid to the taxing district at the next semi-annual settlement period.

. . .

To distribute the cost of examination of each taxing district audited, the fiscal officer of each such taxing district may charge each fund examined with the pro rata share of such examination costs as each fund relates in part to the total examination expense. The bureau of inspection and supervision of public offices shall furnish the fiscal officer of such taxing district, at the conclusion of each examination, a statement showing the total cost of such examination and the percentage chargeable to each fund examined. The fiscal officer may distribute such costs to each fund. The cost of typing reports shall likewise be distributed and each fiscal officer shall be notified of the amount chargeable to the several funds individually. (Emphasis added.)

Upon examination of this statute, the question you raise appears to be directly answered. The problem is not whether the county welfare department is a taxing district, but whether the department's fund may be charged with the costs of an audit. R.C. 117.15 empowers the "fiscal officer" of the "taxing district" to charge each fund with the expense of examining that fund. In the case of a county, the fiscal officer is the county auditor, and under this section, then, the county auditor may impose the costs of examining the county welfare department to the department's fund. The statute is unambiguous in that regard.

Accordingly, it is my opinion, and you are advised that:

1. A county welfare department is an "office" of a "taxing district" for the purposes of R.C. 117.01, and is therefore subject to examination by the Auditor of State through the Bureau of Inspection and Supervision of Public Offices.

2. Under R.C. 117.15, the county auditor, as fiscal officer of the taxing district, may charge the fund of the county welfare department for the costs of an examination of that department conducted by the Bureau of Inspection and Supervision of Public Offices.

### OPINION NO. 78-051

#### Syllabus:

- 1) A board of trustees of a technical college district is without authority under the terms of R.C. 3357.09 to construct a branch campus outside the district.
- 2) A board of trustees of a technical college district is authorized by R.C. 3357.09(L) to conduct technical college courses outside the district. Where the nature of such courses and the availability of facilities within the district require the provision of facilities outside the district, R.C. 3357.09(L) authorizes the board of trustees to acquire interests in real property outside the district.

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**To: William Coulter, Acting Chancellor, Ohio Board of Regents, Columbus, Ohio**  
**By: William J. Brown, Attorney General, August 25, 1978**

I have before me your predecessor's request for my opinion which raises the following question:

Does the board of trustees of a technical college have the legal authority to purchase or lease real estate outside of the technical college district in order to construct or establish a "branch" campus?

In order to answer your question, an understanding of the structure and function of a technical college district is essential.

Technical colleges are created under the terms of R.C. Chapter 3357. The term "technical college district" is defined specifically in R.C. 3357.01(B) as follows:

"Technical college district" means a political subdivision of the state and a body corporate with all the powers of a corporation, comprised of the territory of a city school district or a county, or two or more contiguous school districts or counties, which meets the standards prescribed by the Ohio Board of Regents pursuant to §3357.02 of the Revised Code, and which is organized for the purpose of establishing, owning, and operating one or more technical colleges within the district. (Emphasis added.)

If the creation of a technical college has been approved by the voters of the proposed district (R.C. 3357.02), trustees are to be selected within ninety days (R.C. 3357.05). Prior to commencement of operations, the trustees must submit an "official plan" to the Ohio Board of Regents pursuant to R.C. 3357.07. The relevant portion of that section is as follows:

The board of trustees of a technical college district shall prepare an official plan for a technical college within the district. Such official plan shall include, but not be limited to, a demonstration of need and prospective enrollment, a description and location of lands, buildings, facilities, and improvements proposed to be occupied by such college; a proposed schedule of acquisition of such lands or improvements, and for operation of the college; estimates of cost of lands and improvements;

. . . .

Upon completion of the official plan, the board of trustees of the technical college district shall file a copy thereof with the Ohio Board of Regents which may approve or disapprove any provisions thereof. . . if the Ohio Board of Regents approves the official plan, it shall certify a copy of its action to the board of trustees of the technical college district and issue a charter creating the technical college. . . The official plan shall be appended to and shall become a part of such charter, and such charter shall not thereafter be changed except by charter amendment with the approval of the Ohio Board of Regents. . . (Emphasis added.)

Under the terms of R.C. 3357.01 and 3357.07, the college or colleges operated by a technical college district are to be located within the district. R.C. 3357.07 further requires that the proposed college's lands and improvement be approved by the Board of Regents.

The powers and duties of the board of trustees of a technical college district are set forth in R.C. 3357.09. The relevant portions of that section are as follows:

The board of trustees of a technical college district may:

- (A) Own and operate a technical college, pursuant to an official plan prepared and approved in accordance with section 3357.07 of the Revised Code;
- (B) Hold, encumber, control, acquire by donation, purchase, or condemnation, construct, own, lease, use, and sell, real and personal property as necessary for the conduct of the program of the technical college on whatever terms and for whatever consideration may be appropriate for the purposes of the institution;
- (C) Accept gifts, grants, bequests, and devices [sic] absolutely or in trust for support of the technical college;
- (D) Appoint the president, faculty, and such other employees as necessary and proper for such technical college, and fix their compensation;
- (E) Provide for a technical college necessary lands, buildings, or other structures, equipment, means, and appliances;

. . . .

(L) Enter into contracts and conduct technical courses outside the technical college district;

Under the terms of R.C. 3357.09(L), therefore, the board of trustees of a technical college district is authorized to enter into contracts and conduct technical courses outside the district. Your question thus requires an analysis of whether the power to establish branch campuses outside the district may be said to be necessarily implied from the authority to conduct courses outside the district.

Understandably, there is no case law which touches upon this precise question. However, in Sterkel v. Mansfield Board of Education, 172 Ohio St. 231 (1961), the Supreme Court faced an analogous problem. In Sterkel, the board of education of the Mansfield city schools sought to take realty outside of the district through eminent domain. The Board relied upon R.C. 3313.37 which allows boards of education to purchase realty "...either within or without the district..." No similar provision exists in R.C. 3313.19, which grants eminent domain powers to boards of education. The court ultimately reached the conclusion that the board had no condemnation powers outside of the district. In so deciding the issue they cited Board of Education v. Akron Rural Cemetery, 110 Ohio St., 430(1924) for the proposition that:

When the power to make an appropriation is granted only in general terms, land exempt from appropriation cannot be taken under such general power. Power to take land must be expressly granted in order to authorize such appropriation. Sterkel, at p. 233.

The significance of Sterkel is, I think, twofold. Clearly, in the absence of express authority no subdivision of this state may take property outside of its geographical boundaries by eminent domain. No such authority has been granted to the trustees of a technical college district, and therefore they may not take property outside of their district in such a fashion. More important, however, is the fact while the General Assembly has specifically conferred upon boards of education the authority to purchase or lease property outside of their districts, no similar authority has been conferred upon the trustees of a technical college district. The implication is that the General Assembly did not intend for the trustees to exercise such a power, for otherwise it would have used language similar to that of R.C. 3313.37.

To conclude that a board of trustees of a technical college district lacks the authority to establish a branch campus outside the district is not, however, to imply that the trustees are under all circumstances without the authority to acquire an interest in real property located outside the district. Under the terms of R.C. 3357.09(L), the trustees are authorized to conduct courses outside the district. Thus, where the nature of the technical courses offered and the limitations of the district require, the authority to provide facilities outside the district through the purchase or lease of real property may be necessarily implied from the authority vested in the board of trustees under R.C. 3357.09. As an example, in order to effectively conduct technical courses in aviation mechanics, it would be necessary to have a teaching facility at or near an airport. If the best such facility is located outside the district, I am of the opinion that the terms of R.C. 3357.09(L) would authorize the trustees to provide such a facility. Similarly, there may be instances where the facilities available within the district for providing relevant practical experience in the course of a technical program are so limited as to require the provision of additional facilities outside the district.

Accordingly, it is my opinion, and you are so advised that:

- 1) A board of trustees of a technical college district is without authority under the terms of R.C. 3357.09 to construct a branch campus outside the district.

- 2) A board of trustees of a technical college district is authorized by R.C. 3357.09(L) to conduct technical college courses outside the district. Where the nature of such courses and the availability of facilities within the district require the provision of facilities outside the district, R.C. 3357.09(L) authorized the board of trustees to acquire interests in real property outside the district.

### OPINION NO. 78-052

#### Syllabus:

Employees of state community college districts created pursuant to R.C. Chapter 3358 are employees in the service of the state for the purposes of R.C. Chapter 124, regardless of whether such employees were in the service of a general and technical college prior to the November 4, 1977, effective date of Am. S.B. 229.

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**To: Richard D. Jackson, P.E., Director, Department of Administrative Services, Columbus, Ohio**  
**By: William J. Brown, Attorney General, August 25, 1978**

I have before me your request for my opinion which reads as follows:

Your opinion is respectfully requested on certain questions arising from the interpretation of Sections 3354.02 and 3358.01 through 3358.10 of the Ohio Revised Code. These sections were recently enacted or revised by Amended Senate Bill No. 229, effective November 4, 1977. In addition to enacting or revising the above sections, this bill also changed Shawnee State College, Southern State College and Edison State College from state general and technical colleges to state community colleges.

Our questions are as follows:

1. What effect does this change in status have on the employees of Shawnee, Southern and Edison who in the past were considered to be state employees and therefore covered by Ohio's civil service law, Chapter 124 of the Ohio Revised Code? Do these employees continue to be considered state employees covered by Chapter 124, or are they now exempt from this chapter of the code? It is our understanding that employees of community colleges are not considered to be state employees and therefore are not subject to Chapter 124. However, there seems to be some distinction in the law between community colleges and state community colleges. Therefore, we feel that a clarification of the status of employees of state community colleges is needed.

2. Will future state community colleges created under Sections 3358.01 through 3358.10 of the Ohio Revised Code be subject to Chapter 124?

For the purposes of R.C. Chapter 124, "civil service" is defined by R.C. 124.01 as follows:

"Civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof.

Thus, an employee in the service of one of the entities enumerated above is subject to the civil service provisions of R.C. Chapter 124. There are, however, a number of political subdivisions of the state which are not included within the coverage of R.C. Chapter 124. See, e.g., 1939 Op. Att'y Gen. No. 182, p. 213 (employees of bridge commissions not subject to the civil service laws); 1919 Op. Att'y Gen. No. 125, p. 217 (employees of a park district not within the scope of the civil service laws); 1918 Op. Att'y Gen. No. 1645, p. 1594 (employees and officers of a district tuberculosis hospital not within the provisions of the civil service act.) Consequently, if the employees and officers of a state community college district created pursuant to R.C. Chapter 3358 may be said to be in the service of a state institution, they are subject to the civil service provisions of R.C. Chapter 124. Conversely, if a state community college district is a political subdivision separate and distinct from the state, its employees and officers must be outside the purview of the civil service laws, since such districts are not political subdivisions included under the terms of R.C. 124.01.

An examination of the structure of state community college districts created pursuant to R.C. Chapter 3358 is, thus, essential to the resolution of your questions. Before undertaking such an examination, however, I believe that a brief review of the status of two other institutions of higher learning will highlight the issues underlying your question. A state university is an instrumentality of the state. Thacker v. Bd. of Trustees of Ohio State Univ., 35 Ohio St.2d 49 (1973); Wolf v. Ohio State Univ. Hospital, 170 Ohio St. 49 (1959). Because a state university is an instrumentality of the state, one of my predecessors, in 1965 Op. Att'y Gen. No. 65-79, concluded that employment in the service of a state university is state service within the meaning of the civil service laws.

In contrast, in 1962 Op. Att'y Gen. No. 3073, p. 486, another of my predecessors took cognizance of the status of a community college district created pursuant to R.C. Chapter 3354 as an entity separate and distinct from the state. My predecessor took note of the fact that appointment to the board of trustees of such a district was a matter entrusted primarily to commissioners of the county or counties comprising the district. He further observed that the terms of R.C. 3354.01 and 3354.03 specify that a community college district is a political subdivision of the state vested with the powers of eminent domain, taxation and assessment. It was, therefore, his conclusion that the employees of a community college district created pursuant to R.C. Chapter 3354 were employees in the service of a political subdivision not included within the scope of what is now R.C. Chapter 124. I concur and follow my predecessor's reasoning.

However, the structure of a state community college district created pursuant to R.C. Chapter 3358 differs both from that of a state university and that of a community college created pursuant to R.C. Chapter 3354. Prior to November 4, 1977, the effective date of Am. S.B. 229, R.C. 3358 provided for the creation of institutions known as state general and technical colleges. These institutions could be created by several methods, including proposal by the trustees of a state university, proposal by the trustees of a technical college district, proposal by a board of county commissioners and petition of the electorate of a county. It is my understanding that the three state general and technical colleges created pursuant to R.C. Chapter 3358 were chartered by the Ohio Board of Regents and functioned as state institutions.

Am. S.B. 229, effective November 4, 1977, however, altered both the name of these institutions and the powers assigned the trustees thereof. Under the terms of Section 3 of the Act, the three existing state general and technical colleges

became state community colleges and the counties these three institutions were chartered to serve became state community college districts. The stated purposes of Am. S.B. 229 were:

[T]o change the designation of state general and technical colleges to "state community colleges," to assign state community colleges most of the powers and duties of community colleges, to establish the minimum population necessary to create a state community college district, and to require that trustees of state community colleges be residents of the college districts.

The amended terms of R.C. 3358.01(A) define a state community college district as "a political subdivision composed of the territory of a county, or two or more contiguous counties . . . having a population of at least one hundred and fifty thousand . . ." Because a state community college district is now, under the terms of R.C. 3358.01, defined as a political subdivision, it is no longer clearly an instrumentality of the state. Thus, on the basis of the reasoning set forth in 1962 Op. Att'y Gen. No. 3073, p. 486, it might be said that the amended provisions of R.C. 3358.01(A) imply that employees of a state community college district are no longer employees in the service of the state.

The conclusion reached in the 1962 Opinion, however, was reached not solely on the basis that a community college district is defined as a political subdivision under the terms of R.C. 3354.01, but, rather in reliance upon this designation of a body entrusted under the terms of R.C. 3354.03 with the traditional governmental powers of eminent domain, taxation and assessment. While the amended terms of R.C. 3358.01(A) define a state community college district as a political subdivision, an examination of the provisions of R.C. Chapter 3358 indicate that the district cannot be readily classified as either an entity separate and distinct from the state or as an instrumentality of the state.

In contrast to the powers of taxation, eminent domain and assessment conferred upon a community college district under the terms of R.C. 3354.03 and 3354.12, R.C. 3358.09 specifies that the General Assembly shall support a state community college by such sums of money and in such manner as it may provide. Under the terms of R.C. 3358.09, support for a state community college may be derived from other sources; however, the trustees thereof have not been vested with the power to tax or to appropriate property. In enumerating the powers of the trustees of a community college district, R.C. 3354.09(K) specifies that the board may receive and expend gifts and grants from the state. No analogous power is conferred upon the trustees of a state community college district under the terms of R.C. 3358.08, since R.C. 3358.09 provides for direct funding by the General Assembly. Under the terms of R.C. 3354.05, six of the nine trustees of a community college district are appointed by commissioners of the county or counties comprising the district, with the remaining three trustees appointed by the governor. In contrast, R.C. 3358.03 provides for the appointment of all nine trustees of a state community college district by the Governor, with the advice and consent of the Senate.

In summary, then, under the terms of R.C. Chapter 3358, a state community college district has features common to both the autonomous community college district created under R.C. Chapter 3354 and the state universities which are clearly instrumentalities of the state. While the terms of R.C. Chapter 3358 suggest that the districts therein created operate with what may be a greater degree of autonomy than that enjoyed by a state university, the General Assembly has not seen fit to clothe the state community college districts created therein with those most significant indicia of an entity separate and distinct from the state, the powers of taxation, assessment and eminent domain. The government and operation of such districts is entrusted to a board of trustees appointed by the chief executive officer of the state with the advice and consent of the Senate. The support of such districts is a matter reserved to the General Assembly. It is,

therefore, my conclusion that the employees of state community college districts created and operated under R.C. Chapter 3358 should, for the purposes of R.C. Chapter 124, be regarded as employees in the service of the state. This conclusion renders any consideration of a difference in status between employees of the three existing districts and those of districts subsequently created unnecessary.

In specific answer to your question, it is my opinion, and you are so advised, that employees of state community college districts created pursuant to R.C. Chapter 3358 are employees in the service of the state for the purposes of R.C. Chapter 124, regardless of whether such employees were in the service of a general and technical college prior to the November 4, 1977, effective date of Am. S.B. 229.

Opinions for January 1979  
Advance Sheets will commence  
on following page 2-129







**OPINION NO. 78-053****Syllabus:**

1. The Ohio Youth Commission must, pursuant to R.C. 3323.05 and R.C. 3323.091, appoint parent surrogates for any handicapped child under its care and custody when the child's legal guardian or parent is unknown or unavailable and the child is placed in a special education program. The person so appointed may not be an employee of the Youth Commission.
2. A child who is committed to the Ohio Youth Commission under R.C. Chapter 5139 is not a "ward of the state" for purposes of R.C. 3323.05, unless the child's parent or legal guardian is unknown or unavailable. If the parent or guardian is unknown or unavailable the Youth Commission must appoint a parent surrogate if the child is handicapped and is to be placed in a special education program.

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**To: William K. Willis, Director, Ohio Youth Commission, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 2, 1978**

I have before me your request for my opinion which concerns R.C. 3323.05. That section was enacted as a part of Am. Sub. H.B. 455, effective August 27, 1976, relating to the identification, evaluation, educational placement and education of handicapped children. R.C. 3323.05 requires the establishment of procedural safeguards in decisions relating the education of handicapped children, in part, as follows:

The state board of education shall establish procedures to assure that handicapped children and their parents are guaranteed procedural safeguards in decisions under this chapter relating to the identification, evaluation, or educational placement of a handicapped child or the provision of education or related services under this chapter.

The procedures shall include, but need not be limited to:

. . . .

(B) Procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state, including the assignment of an individual, who shall not be an employee of any agency involved in the education or care of the child, to act as a surrogate for the parents.

This section relates to the Ohio Youth Commission by virtue of R.C. 3323.091, since it states that:

The Department of Mental Health and Mental Retardation and the Ohio Youth Commission shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the Ohio State Board of Education . . .

The questions you raise involve the status of the Ohio Youth Commission with respect to handicapped children under commitment to institutions within its jurisdiction. Specifically you ask:

1. Do the applicable law and standards require the Ohio Youth Commission (which operates the special education programs in its institutions) to appoint an individual to act as a parent surrogate in those cases where the natural parents or guardian is unknown or unavailable, or may the Commission serve as the "parent" for those children, considering the fact that the Commission is the legal custodian of all children committed to it by virtue of Section 5139.01(A)(3) of the Ohio Revised Code of Ohio, and by virtue of the fact that Section 3323.01 of the Revised Code of Ohio defines "parent" to include the child's custodian.

2. Does the fact that a child is committed to the Ohio Youth Commission make that child a "ward of the state" within the meaning of Section 3323.05(B) of the Revised Code of Ohio, and if so, would the Commission then be required to appoint a parent surrogate for all children which it places, evaluates, or identifies in the special education program? If the Commission is required to appoint a parent surrogate for all of these children, as the result of their being "wards of the state," would there be any reason why the natural parents could not be so appointed where that would be desirable?

As set forth in R.C. 3323.02, the purpose of R.C. Chapter 3323 is:

[T]o assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education.

Accordingly, no educational program operated for the benefit of handicapped children shall receive state or federal funds unless it complies "with all procedures, standards and guidelines . ." promulgated by the State Board of Education.

As indicated in R.C. 3323.05(B), *supra*, one of necessary prerequisites of any special education program is the requirement that procedural safeguards be maintained. Pursuant to that section, the State Board of Education has adopted specific rules relating to the appointment of parent surrogates and State Board of Education Standard, 3301-51-16(C) provides as follows:

(C) Parent Surrogates

Due process and procedural safeguard policies and procedures shall include procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state or when the child is without a formally

declared legal representative. These policies and procedures shall include provisions to insure that:

(1) When written permission is not forthcoming from the child's parent or legal guardian to begin any of the evaluation processes, a written inquiry shall be sent to the adult in charge of the child's place of residence, as well as to the parents or legal guardian at their last known address. If these efforts find that the child is without a parent or guardian, or if it is otherwise known that they are unavailable, then a request for a parent surrogate shall be filed with the superintendent of the school district.

(2) Upon receipt of a request for a parent surrogate, the superintendent or his designated representative shall, within thirty days, utilize all available information to determine if the child is in need of a surrogate and shall assign one if such study so indicates.

(3) The parent surrogate will be responsible for protecting the rights of the child through the complete decision making process including the appeals process, if that occurs, and the first review of the placement.

(4) The parent surrogate shall not be an employee of the school district, state or local educational agency involved in the education or care of the child.

(5) The school district or other educational agency, shall individually or in cooperation with other districts provide an information program for parent surrogates regarding their role and responsibilities.

(6) A child who has reached the age of majority may request a parent surrogate when no parent is available.

(7) To the extent possible, parent surrogates should match the child's cultural and linguistic background.

Your first question turns upon the fact that, for the purposes of R.C. Chapters 3321 and 3323, R.C. 3323.01 defines the term "parents" to include a child's guardian or custodian. As you have observed, under the terms of R.C. 5139.01(A)(3), upon permanent commitment, a child is in the legal custody of the Youth Commission. However, under the terms of R.C. 5139.01(A)(4), legal custody encompasses the following rights and responsibilities:

"Legal custody," insofar as it pertains to the status which is created when a child is permanently committed to the youth commission, means a legal status wherein the commission has the following rights and responsibilities: the right to have physical possession of the child; the right and duty to train, protect, and control him; the responsibility to provide him with food, clothing, shelter, education, and medical care; and the right to determine where and with whom he shall live; provided, that these rights and responsibilities are exercised subject to the powers,

rights, duties, and responsibilities of the guardian of the person of the child, and subject to any residual parental rights and responsibilities.

The rights and responsibilities vested in the Commission as custodian thus are only as specified statutorily. An argument relying on the provisions of R.C. 3323.01 and 5139.01 that the Youth Commission is the "parent" of a handicapped child for the purposes of R.C. 3323.05 would emphasize the letter rather than the spirit of R.C. Chapter 3323. Such an argument would further ignore the purpose of the Chapter, as set forth by R.C. 3323.02. The procedural safeguards required by R.C. 3323.05(B) and the standards developed by the State Board of Education pursuant thereto contemplate an adversarial situation as the best method of protecting the rights and interests of the child.

To determine the intent of the General Assembly is, of course, the object of statutory construction; in this instance, the legislative intent is clear. R.C. 3323.05(B) requires the appointment of an individual to act as a parent surrogate when a child's parents are unknown or unavailable. This requirement is mandatory, not discretionary. As set forth above, the standards developed by the State Board of Education pursuant to R.C. 3323.05(B) require a child's superintendent to determine within thirty days after commitment if a child is in need of a surrogate. Under the provisions of R.C. 3323.091, the Director of the Ohio Youth Commission is a child's superintendent for the purposes of this requirement. R.C. 3323.05(B) specifically provides that the parent surrogate may not be an employee of any agency involved in the education or care of the child. I am, therefore, of the opinion that any argument under the terms of R.C. 5139.01 that the agency, as a limited custodian, may act as the surrogate parent must fail in light of the legislative intent manifest in the express terms of R.C. 3323.05 and the administrative standards promulgated thereunder.

Your second question requires an interpretation of the phrase "ward of the state" as used in R.C. 3323.05(B) and in the standards of the State Board of Education. Again, determination of the intent of the legislature is of paramount concern. Your question thus centers upon whether the legal custody devolved upon the Commission under the terms of R.C. 5139.01 operates to make a child committed thereto a ward of the state for the purposes of R.C. 3323.05(B). As set forth above, the provisions of R.C. 5139.01(A)(4) confer upon the Commission rights to be exercised subject to the powers, rights, duties and responsibilities of the guardian of the person of the child and subject to any residual parental rights and responsibilities. I am, therefore, of the opinion that the terms of R.C. 5139.01(A)(3) and (4) prevent the conclusion that all children committed to the Commission are wards of the state for the purposes of R.C. 3323.05(B). Under the terms of R.C. 1.51, in enacting a statute, it is presumed that a result both reasonable and feasible of execution is intended. To interpret the phrase "ward of the state" as used in R.C. 3323.05(B) to include all children committed to the Ohio Youth Commission would compel the appointment of parent surrogates for each such child, even where a child's parents are known, available and very much concerned with the child's interests. For this reason, I am of the opinion that the Commission's duty to appoint a parent surrogate arises only where a child's parent or legal guardian is unknown or unavailable.

In specific answer to your question, it is my opinion, and you are so advised that:

1. The Ohio Youth Commission must, pursuant to R.C. 3323.05 and R.C. 3323.091, appoint parent surrogates for any handicapped child under its care and custody when the child's legal guardian or parent is unknown or unavailable and the child is placed in a special education program. The person so appointed may not be an employee of the Youth Commission.

2. A child who is committed to the Ohio Youth Commission under R.C. Chapter 5139 is not a "ward of the state" for purposes of R.C. 3323.05, unless the child's parent or legal guardian is unknown or unavailable. If the parent or guardian is unknown or unavailable the Youth Commission must appoint a parent surrogate if the child is handicapped and is to be placed in a special education program.

**OPINION NO. 78-054**

**Syllabus:**

1. A township trustee may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, during his existing term in office, without violating Art. II, §20, Ohio Const., even though he had previously declined to participate in the plan, provided that participation in the plan was available to him at the commencement of his term in office.
2. A township trustee, who is appointed to fill an unexpired term in office, may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, without violating Art. II, §20, Ohio Const., even though the previous holder of the office did not participate in the plan, provided that the plan is available to township trustees prior to actual commencement of his holding of the office.

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**To: James R. Unger, Stark County Pros. Atty., Canton, Ohio**  
**By: William J. Brown, Attorney General, October 2, 1978**

I have before me your request for my opinion which raises the following questions:

1. Can a township, or other political subdivision which has in effect a policy of insurance pay the cost of all of the premiums thereof for an elected official who did not participate in such coverage at the beginning of his term but now desires to participate in such coverage during his term where the premiums for such insurance have not increased?
2. Can a township or other political subdivision pay the premiums of medical care insurance for an appointed official who succeeds an elected official during his term of office which elected official did not participate in such coverage where there was in effect in the subdivision a policy of medical care insurance where the premiums for such insurance have not increased during the term of office?

Township trustees are authorized to procure health and hospitalization coverage for themselves under R.C. 505.60. That section states:

The board of township trustees of any township may procure and pay all or any part of the cost of hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance provide uniform coverage for township officers and employees and their immediate dependents from the funds or budget from which said officers or employees are compensated for services, . . . Any township officer or employee may refuse to accept the insurance coverage without affecting the availability of such insurance coverage to other township officers or employees. . . .

Under the Ohio Constitution, officers may not receive an increase in compensation during an existing term of office. Specifically, the state constitution provides:

The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished. Ohio Const. art. II §20.

The provision applies to township trustees. State, ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62 (1975).

As you indicate in your letter, there is no question that payment of insurance premiums by a political subdivision for one of its officers is "compensation" within the purview of Ohio Const. Art. II, §20. State, ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389 (1976). Therefore, the sole issue raised by your first question is whether the trustee's refusal to accept insurance at the commencement of his term, even though the insurance was available, prevents that trustee from acceptance of the insurance at a later point during that term.

There appears to be no precedent on this precise issue, however, the authorities which touch upon Art. II, §20, consistently rely upon the fact that any increase in compensation must be in existence must be effect prior to the commencement of a term in order to be proper. For example, in 1972 Op. Att'y Gen. No. 72-059, I concluded that:

The payment of hospitalization benefits for a municipal official by an ordinance adopted after the beginning of the official's term is contrary to Article II, Section 20 of the Constitution of Ohio . . . . (Emphasis added.)

A similar rationale supported 1975 Op. Att'y Gen. No. 75-061, which dealt with group life insurance.

In construing a provision of the constitution, the primary objective is to effectuate the intended result. The goal of Art. II, §20, is clearly to prevent officeholders from voting themselves a "raise" during an existing term. Protection of public funds is, of course, the result. Where, as here, the officeholder at first declines to accept a portion of the compensation available to him, the public treasury is better off. The officeholder should not be penalized for declining insurance which was properly available to him at the beginning of his term. Indeed, the officeholder is asking for nothing more than would have been available to him all along. Therefore, the intended result of Art. II, §20, is achieved. Accordingly, it is my opinion that a township trustee, or any other officer of the state or political subdivision, may exercise an option to accept insurance paid for in whole or in part by the entity of which he is an officer during an existing term, without violating Art. II, §20, Ohio Const., even though he had previously declined such insurance, provided that the insurance was available to him at the commencement of the term in office.

Your second question involves a situation in which a township trustee was appointed to fill an unexpired term. Apparently, the former officeholder decided not to participate in the township's health insurance plan, even though it was available to him, however, the appointee wishes to participate. You ask whether Art. II, §20, prevents such participation. The issue appears to be resolved by State, ex rel. Glander v. Ferguson, 148 Ohio St. 589 (1947). In that case, it was held that the word "term" as used in Art. II, §20, applies only to the duration of the officeholder's stay in office, and not to the statutory term for the office. Thus, the Supreme Court held in Ferguson that it was permissible to pay a salary increase to an appointee who took office after the effective date of the legislation granting the increase, even though it became effective during the first portion of the statutory term for that office. Applied to your question, it is clear that the township trustee may exercise the option to participate in the health insurance plan, even though his predecessor did not participate.

Accordingly, it is my opinion, and you are so advised that:

1. A township trustee may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, during his existing term in office, without violating Art. II, §20, Ohio Const., even though he had previously declined to participate in the plan, provided that participation in the plan was available to him at the commencement of his term in office.
2. A township trustee, who is appointed to fill an unexpired term in office, may opt to participate in a group health insurance plan paid for in whole, or in part, by the township under R.C. 505.60, without violating Art. II, §20, Ohio Const., even though the previous holder of the office did not participate in the plan, provided that the plan is available to township trustees prior to actual commencement of his holding of the office.

#### OPINION NO. 78-055

#### Syllabus:

R.C. 307.441 (E) requires a board of county commissioners to procure liability insurance for all county officials named in R.C. 307.441 (A) to (D) if it purchases such insurance for any county official named therein.

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To: John F. Holcomb, Butler County Pros. Atty., Hamilton, Ohio  
 By: William J. Brown, Attorney General, October 2, 1978

I have before me your request for my opinion which may be summarized as follows:

Does R.C. 307.441 (E) require a county commission to obtain liability insurance for all persons mentioned in R.C. 308.441 if it obtains false arrest insurance for deputy sheriffs?

R.C. 308.441 permits county commissioners to procure liability insurance for certain county employees. R.C. 308.441 (A) provides for insurance coverage for the

county recorder, the clerk of the Court of Common Pleas, and the deputies of such officers. R.C. 307.441 (B) empowers a board to purchase such insurance for the county sheriff and his deputies. R.C. 307.441 (C) allows a board to provide such coverage to the county prosecuting attorneys and assistant prosecuting attorneys. R.C. 307.441 (D) allows the Board to procure liability coverage for the county coroner, engineer, auditor, each commissioner, the treasurer and the assistants of those officers.

R.C. 307.441 (E) places the following restriction upon the power of a board of county commissioners to procure liability insurance:

(E) If the board of county commissioners of any county procures a policy or policies of insurance insuring any county official against liability arising from the performance of his official duties as provided by divisions (A) to (D) of this section, it shall procure policies of insurance insuring all county officials as authorized in those divisions. (Emphasis added.)

Your question concerns the effect of this division. Specifically, you ask whether R.C. 307.441 (E) requires a board of county commissioners to purchase liability insurance for all county employees mentioned in R.C. 307.441 if it authorizes the purchase for any one of them. The language employed in R.C. 307.441 (E) is susceptible of two reasonable interpretations. First, it might be construed to require the purchase of liability insurance for each officer and employee mentioned in the particular division of the section in which the position of the officer or employee is found. It might also be read to require the purchase of insurance for all county officers or employees enumerated in the section if it is purchased for any one of them. I am persuaded that the latter interpretation is correct. In Summary of 1975 Enactments January-October 1975, at page 179, the Legislative Service Commission stated that Am. S.B. No. 143, which amended R.C. 307.441 into its present form, ". . . requires liability insurance to be purchased for all county officials if purchased for any official . . ." While such interpretation is not dispositive, it is indicative of the understanding of the General Assembly of the effect of Am. S.B. No. 143. Moreover, the last sentence of R.C. 307.441(E) states that if liability insurance is purchased for any one county official, it must be purchased for all county officials authorized in those divisions. The use of the plural rather than the singular "division" indicates that all officials, rather than just those in any one particular division, are to receive insurance if one of the officials or employees enumerated in that section receive it.

Accordingly, it is my opinion, and you are so advised, that R.C. 307.441(E) requires a board of county commissioners to procure liability insurance for all county officials named in R.C. 307.441(A) to (D) if it purchases such insurance for any county official named therein.

#### OPINION NO. 78-056

##### Syllabus:

1. Neither the original mine operators, nor their heirs or assigns have any statutory reclamation responsibility for certain abandoned mines located near Youngstown, Ohio.
2. The State of Ohio has no reclamation responsibility for certain abandoned mines located near Youngstown, Ohio, since no bonds were ever supplied the State by the operators of such abandoned mines.

**To: Robert Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 2, 1978**

I have before me your request for my opinion concerning first, the "continuing reclamation responsibility" of the original operators of certain abandoned mines located near Youngstown, Ohio, and second, the reclamation responsibility of the State of Ohio for the abandoned mines as a result of the forfeiture of any bond supplied the State by the operators of the mines in question.

The facts you have supplied me with are as follows. In the late 1800's and early 1900's mine operators obtained the mineral (coal) rights from certain landowners near Youngstown, Ohio. The coal was removed to the point where the value of the mineral rights was exhausted and the mining companies abandoned the operations. Recently, certain shafts from these abandoned mines have opened up or otherwise unsealed, causing gaping holes to open on the surface of the land.

Your first question centers around the continuing responsibility of the operators of these mines, or their agents or assigns, to correct this problem. Sections 4153.39 to 4153.99, inclusive, of the Ohio Revised Code regulate the abandonment of mines in Ohio. Revised Code Section 4153.40 governs the closing of the surface openings of mines and specifically requires the closing of abandoned vertical shafts and other mine openings, but the section's provisions only apply to shafts and other openings of mines abandoned after August 26, 1949.

The legislative history of these sections reveal that they were amended in 1883 to read as follows:

And when any mine is exhausted or abandoned, and before the pillars are drawn in any portion of the mine, the owner or agent thereof shall cause to be made a correct map of such mine . . . and file such map . . . at the office of the county recorder in the county where such mine is located. (Section 296).

In 1941, Am. S.B. 326 was enacted to revise, consolidate and codify the mining laws of Ohio. G.C. 898-109 was enacted by that bill to read, in part:

The owner, lessee, or agent shall effectively close or fence all openings to mines abandoned subsequent to passage of this act so that persons or animals cannot inadvertently enter therein.

In 1949, G.C. 898-109 was further amended by Am. S.B. 297 to impose further duties upon the operators of vertical shafts or other underground workings abandoned after August 26, 1949. This statute survives as Section 4153.40 of the Revised Code.

Assuming that the mines involved were abandoned prior to August 26, 1949, mine operators in Ohio are under no statutory obligation to close openings to their mines. Therefore, the State does not have a cause of action against them to repair the surface subsidence which has occurred.

Turning to your second question, there can be no doubt that the state has no reclamation responsibility for mines abandoned in the Youngstown area fifty or more years ago through the forfeiture of some bond or bonds supplied the State by operators of those mines. Neither the current nor former provisions of the Ohio Revised Code dealing with deep mines, R.C. Chapter 4151, required operators of deep mines to provide the state with any kind of performance bond. Accordingly, no proceeds have accrued to the State of Ohio as a result of the forfeiture of bonds supplied the State by deep mine operators in the Youngstown area during the time period under discussion. Since no bonds were even filed, the State clearly has no responsibility to reclaim the areas of surface subsidence in Youngstown.

Thus, it is my opinion and you are so advised that:

1. Neither the original mine operators, nor their heirs or assigns have any statutory reclamation responsibility for certain abandoned mines located near Youngstown, Ohio.
2. The State of Ohio has no reclamation responsibility for certain abandoned mines located near Youngstown, Ohio, since no bonds were ever supplied the State by the operators of such abandoned mines.

#### OPINION NO. 78-057

#### Syllabus:

1. A policy for the payment of accumulated, unused sick leave, adopted by a political subdivision pursuant to R.C. 124.39(C), need not be uniform as to all offices, agencies and departments found within such political subdivision.
2. The board of county commissioners is responsible for promulgating a policy for the payment of accumulated, unused sick leave to county employees upon retirement pursuant to R.C. 124.39(C).
3. The board of township trustees is responsible for promulgating a policy for the payment of accumulated, unused sick leave to township employees upon retirement pursuant to R.C. 124.39(C).
4. The legislative authority of a municipal corporation is responsible for promulgating a policy for the payment of accumulated, unused sick leave to municipal employees upon retirement pursuant to R.C. 124.39(C).
5. The board of education is responsible for promulgating a policy for the payment of accumulated, unused sick leave for eligible employees of a school district upon retirement pursuant to R.C. 124.39(C).

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 4, 1978**

I have before me your request for my opinion, in which the following questions are asked:

1. Does section 124.39(C), O.R.C., by its reference to "political subdivision", rather than "appointing authority", require a uniform policy as to the payment of sick leave credit upon retirement for all offices, agencies and departments within the subdivision?

2. What authority is responsible for the adoption of any such modification of statutory policy by a:
  - a. county;
  - b. township;
  - c. municipal corporation;
  - d. school district?

As you note in your letter, Am. Sub. H.B. No. 179, enacted by the 112th General Assembly repeals R.C. 124.391 and replaces it with R.C. 124.39(B) and (C). The act, effective September 25, 1978 makes two significant changes in the payment of accumulated, unused sick leave to public employees paid other than by warrant of the Auditor of State. First, a policy for such payment must now be promulgated by a political subdivision, rather than by an appointing authority. Second, a political subdivision may not adopt a policy for the payment of accumulated, unused sick leave which gives its employees fewer benefits than granted to state employees pursuant to R.C. 124.39(A) or that requires greater qualifying service than required of state employees.

Your initial question concerns whether a payment policy established by a political subdivision pursuant to R.C. 124.39(C) must be applied uniformly to all offices, agencies and departments contained within that subdivision. R.C. 124.39(C) provides as follows:

A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of his unused sick leave or for more than the aggregate value of thirty days of his unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.

The express language of R.C. 124.39(C) does not require that a policy be applied uniformly with respect to all offices, agencies and departments contained within a political subdivision. Neither is there anything implicit in the word "policy" which mandates such a uniform application. Because "policy" is not defined in R.C. Chapter 124, it must be ". . . read in the context and construed according to the rules of grammar and common usage." R.C. 1.42. "Policy" is defined in Webster's Third New International Dictionary (1961) as follows:

. . . a definite course or method of action selected (as by a government, institution, group or individual) from among alternatives and in light of given conditions to guide and usually determine present or future decisions.

Accordingly, because of the absence of language in R.C. 124.39 either expressly or impliedly requiring a political subdivision to promulgate a uniform policy for the payment of accumulated, unused sick leave uniformly as to all offices, agencies and departments contained therein, I conclude that such policy need not be uniform. However, if such distinctions are drawn, they must be reasonable in order to comport with the guarantees of equal protection found in Art. I, §2, Ohio Const. and the Fourteenth Amendment of the United States Constitution. See, e.g. State, ex rel. City of Garfield Heights v. Nadratowski, 46 Ohio St. 2d 441 (1976); Kinney v. Kaiser Aluminum & Chemical Corp., 41 Ohio St. 2d 120 (1975).

Your second inquiry concerns who may act on behalf of a political subdivision to promulgate or modify a policy pursuant to R.C. 124.39(C). A political subdivision

acts through natural persons designated by statute. In the case of a county, its board of county commissioners is vested with the authority to do whatever the county, as a quasi-corporate entity, might do if capable of rational action, except in respect to matters the cognizance of which is vested in some other officer or person. Shanklin v. Board, 21 Ohio St. 575, 583 (1871); 1973 Op. Att'y Gen. No. 73-066. Therefore, it is my opinion that the board of county commissioners is responsible for promulgating a policy for the payment of accumulated, unused sick leave to county employees upon retirement pursuant to R.C. 124.39(C).

Payment for accumulated sick leave upon retirement is compensation. State, ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391. A county auditor, treasurer, sheriff, engineer, recorder, probate judge and clerk of the court of common pleas may fix the compensation of their employees, under R.C. 325.17 and R.C. 325.27. While it might be argued that, pursuant to such authority, those officials may determine the amount of accumulated sick leave to be paid upon retirement to their employees, the better view is that such officers lack the authority to promulgate a sick leave payment policy. R.C. 1.51 codifies the common law rule that specific statutes prevail over general ones, unless the General Assembly has clearly manifested a different intention. In the instant situation, the General Assembly, in enacting R.C. 124.39(C), limited the authority to promulgate a policy concerning the payment of accumulated sick leave upon retirement to a political subdivision. The county offices mentioned in R.C. 325.17 and R.C. 325.27 are not political subdivisions. Therefore, it cannot be said that they have the power to promulgate a policy pursuant to R.C. 124.39(C).

Similarly, a board of township trustees is the governing body of a township, responsible for conducting its business. Harding v. Trustees of New Haven Twp., 3 O. 227 (1827); 1963 Op. Att'y Gen. No. 572. Therefore, the board of township trustees is responsible for promulgating a policy for the payment of accumulated, unused sick leave to township employees, pursuant to R.C. 124.39(C).

The legislative authority of a municipal corporation is permitted by R.C. 715.03 to exercise and enforce the powers of a municipality. Accordingly, the legislative authority of a municipal corporation is responsible for promulgating a policy for the payment of accumulated, unused sick leave to municipal employees, pursuant to R.C. 124.39(C).

In part (d) of your last question, you ask who is responsible for the promulgation of a sick leave payment policy for a school district. R.C. 3313.17 states that the board of education of a school district is a body corporate and politic, capable of contracting, holding property, and suing or being sued, in its own name. Further, a board of education is vested, pursuant to R.C. 3313.47, with the authority to manage and control the public schools found in its district. Accordingly, it is my opinion that the board of education is responsible for promulgating a policy for the payment of accumulated, unused sick leave for the eligible employees of a school district, pursuant to R.C. 124.39(C).

Therefore, it is my opinion, and you are so advised, that:

1. A policy for the payment of accumulated, unused sick leave, adopted by a political subdivision pursuant to R.C. 124.39(C), need not be uniform as to all offices, agencies and departments found within such political subdivision.
2. The board of county commissioners is responsible for promulgating a policy for the payment of accumulated, unused sick leave to county employees upon retirement pursuant to R.C. 124.39(C).
3. The board of township trustees is responsible for promulgating a policy for the payment of accumulated, unused sick leave to township employees

upon retirement pursuant to R.C. 124.39(C).

4. The legislative authority of a municipal corporation is responsible for promulgating a policy for the payment of accumulated, unused sick leave to municipal employees upon retirement pursuant to R.C. 124.39(C).
5. The board of education is responsible for promulgating a policy for the payment of accumulated, unused sick leave for eligible employees of a school district upon retirement pursuant to R.C. 124.39(C).

#### OPINION NO. 78-058

#### Syllabus:

- 1) R.C. 124.41 requires that all persons originally appointed as policemen or policewomen in a city or civil service township police department be at least twenty-one years of age.
- 2) R.C. 737.15 and 737.16 permit the appointment of otherwise qualified persons of the age of eighteen to the offices of village marshal, deputy marshal, policeman, night watchman and special policeman.
- 3) R.C. 311.04 permits the appointment of an otherwise qualified person of the age of eighteen to the office of deputy sheriff.
- 4) R.C. 509.01 and 505.49 permit the appointment of otherwise qualified persons of the age of eighteen to township police positions, unless, in the operation of a police district pursuant to R.C. 505.48 et seq., the board of trustees under R.C. 505.49 has acted by a two-thirds vote to establish a higher age requirement.

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To: **Wilfred Goodwin, Executive Director, Ohio Peace Officer Training Council, Columbus, Ohio**

By: **William J. Brown, Attorney General, October 25, 1978**

I have before me your predecessor's request for my opinion as to the effect of R.C. 3109.01, which fixes the legal age of majority at eighteen years, upon the various sections of the Revised Code that provide for the appointment of peace officers. Specifically, you have requested an opinion as to the age requirements applicable to the following types of peace officers:

- 1) Those employed by a municipal corporation or township having a civil service system.
- 2) Those serving a township which is not subject to the civil service laws.
- 3) Those serving as deputy sheriffs.

As noted in your letter, for many years the provisions of R.C. 3109.01 fixed the legal age of majority at twenty-one years. However, Am. Sub. S.B. 1, 135 Laws

of Ohio, effective January 1, 1974, amended the provisions of R.C. 3109.01 to read as follows:

All persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes.

The provisions of Am. Sub. S.B. 1 amended over seventy sections of the Revised Code, many of which set an age requirement for a variety of activities. For example, the provisions of R.C. 143.32, now R.C. 124.42, were amended to specify that no person shall be eligible for appointment as a fireman in a fire department subject to the civil service laws who has not attained the age of eighteen. As you observe, however, Am. Sub. S.B. 1 left unchanged the age requirement of what is now R.C. 124.41, which requires that an individual attain the age of twenty-one before becoming eligible for appointment to the police departments subject thereto. Moreover, as you have further observed, Am. Sub. S.B. 1 made no change in several other sections of the Revised Code which, while providing for the appointment of peace officers, set no specific age requirements.

Consequently, your question requires an analysis of statutory provisions for the appointment of the classes of peace officers listed in your letter. I believe, however, that an examination of the general principles controlling requirements for public office will be useful prior to any consideration of the specific offices listed in your letter.

There are a number of tests which have been applied by the courts over the years to distinguish the public officer from the public employee. It has been said that where an individual has been appointed in a manner prescribed by law, has a designation or title given him by law, and performs governmental functions concerning the public assigned by law, he must be regarded as a public officer. See, e.g. State, ex rel. v. Brennan, 49 Ohio St. 33 (1892); State, ex rel Attorney General v. Wilson, 29 Ohio St. 347 (1876). A public office has also been described as a charge or trust conferred by public authority for a public purpose with independent and continuing duties requiring the exercise of a portion of the sovereign power. State, ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944). Because police officers, by whomever appointed or elected, derive their authority from the sovereign power for the purpose of enforcing observance of the law, they are generally regarded as public officers rather than public employees. See, e.g., Cleveland v. Luttner, 92 Ohio St. 493 (1915); New York, Chicago and St. Louis Railroad Co. v. Fieback, 87 Ohio St. 254 (1912). Your questions thus center upon the authority of the General Assembly to set qualifications for appointment to the law enforcement positions listed in your letter.

While it is often said that all persons are normally eligible and qualified for office unless excluded by some constitutional, statutory or legal disqualification, the power of a legislative authority to fix qualifications for the offices it creates has long been recognized. See, e.g., Boyd v. Nebraska, 143 U.S. 135, 36 L.Ed. 103, 12 S. Ct. 375 (1891); State, ex rel. Boda v. Brown, 157 Ohio St. 368 (1952). Moreover, it has further been established, in recognition of legislative power to fix such qualifications, that there is no basic or inherent right to public office. State, ex rel. Platz v. Mucci, 10 Ohio St. 2d 60 (1967). For this reason, reasonable qualifications for office, including those pertaining to age, have consistently been recognized as valid. Boyd v. Nebraska, *supra*, (The age limits for certain office may by constitutional or statutory provision be placed beyond the age of majority). State, ex rel. Boda v. Brown, *supra*, (The General Assembly may establish a mandatory retirement age); State ex rel. City of Garfield Heights v. Nadratowski, 46 Ohio St.2d 441 (1976) (Prohibition against holding other public office has a reasonable basis so as to be within the equal protection clause). For this reason, I am of the opinion that the General Assembly or other appropriate legislative authority, is authorized to fix age requirements for appointment as a peace officer.

As set forth above, the amended terms of R.C. 3109.01 specify that persons of the age of eighteen years are of full age for all purposes. However, I am unable to conclude that the General Assembly's use of this language in R.C. 3109.01 precludes

any exercise of its power to set qualifications for office in instances where it may elect to set a higher age requirement. Under the terms of R.C. 1.51, where a general statutory provision conflicts with a local provision, they shall be construed, if possible, so that effect is given to both. To the extent that the provision of R.C. 3109.01 that persons of the age of eighteen are of full age for all purposes may seem in conflict with any specific statutory provisions which set a higher age requirement, I am of the opinion that effect may be given to both through the recognition of the legislative power to impose an age requirement beyond the age of majority.

With this conclusion in mind, I turn now to the statutory provisions for the appointment of the various peace officers listed in your letter. As noted above, R.C. 124.41 provides for the appointment of personnel to a police department, in pertinent part, as follows:

No person shall be eligible to receive an original appointment to a police department, as a policeman or policewoman, subject to the civil service laws of this state, unless he has reached the age of twenty-one and has not more than one hundred twenty days prior to the date of such appointment, passed a physical examination, given by a licensed physician, showing that he or she meets the physical requirements necessary to perform the duties of a policeman or policewoman as established by the civil service commission having jurisdiction over the appointment.

By its own terms, this requirement is limited to appointments to police departments subject to the civil service laws of this state. R.C. 124.01(C) defines the classified civil service for the purposes of Chapter 124, to include the competitive classified service of the state, the counties, cities, city health districts, general health districts, and city school districts and civil service townships. Consequently, the provisions of R.C. 124.41 set forth above apply only to appointments to the police departments of one or more of these entities. While several of these subdivisions of the state have law enforcement powers, only the cities and service townships are authorized to create police departments. I am, therefore, of the opinion that the provisions of R.C. 124.41 operate to set a minimum age of twenty-one for original appointment as a policeman or policewoman to a city or civil service township police department. It should, however, also be noted that R.C. 124.41 further specifies that nothing in the section shall be construed as preventing either a municipal corporation or a civil service township from establishing a police cadet program and employing persons at age eighteen for the purpose of training.

While the express terms of R.C. 124.41 refer to "municipal corporations," it must be observed that R.C. 124.01 does not include within the scope of the civil service those in the service of a village. For this reason, employees of a village are not subject to the provisions of R.C. Chapter 124, 1916 Op. Att'y Gen. No. 1772, p. 1186. R.C. 737.15 provides for the appointment of a village marshal, designated chief of police. R.C. 737.16 provides for the appointment of deputy marshalls, policemen, night watchmen and special policemen. R.C. 737.15 requires that a village marshal be a resident of the village and pass a physical examination. No age requirement is set by R.C. 737.15. R.C. 737.16 requires that all persons appointed under the section pass a physical examination. Again, no age or residency requirements are set. Under the home rule provisions of Ohio Const. Art. XVIII, §3, a village legislative authority may well be authorized to set a higher age requirement for appointment to its police force. Because qualification as an elector is the most basic qualification for holding public office, however, I am of the opinion that the terms of R.C. 737.15 and 737.16, when read in conjunction with R.C. 3109.01, must be construed as requiring all persons appointed thereunder be at least eighteen years of age.

R.C. 311.04 authorizes the sheriff of each county to appoint deputies. This section sets no age, residency or physical requirements for such an appointment. Under the terms of R.C. 3109.01, therefore, it would appear that any otherwise

qualified person who has attained the age of eighteen years may be appointed by the sheriff.

As discussed in 1976 Op. Att'y Gen. No. 76-027, a board of township trustees may elect one of several methods to provide police protection. Where a township has elected to become a civil service township, the operation of its police department is subject to the provisions of R.C. 124.41 as discussed above. However, where a township has not become a civil service township, its trustees may choose to provide police protection through the appointment of constables pursuant to R.C. 509.01. That section authorizes the board of trustees to designate any qualified persons as police constables, with no specific age set. Consequently, under the terms of R.C. 3109.01, it would appear that any otherwise qualified person who has attained the age of eighteen may be appointed pursuant to R.C. 509.01.

The board of township trustees, however, may also elect to obtain police services through the creation of a township police district pursuant to R.C. 505.48 et seq. Under the terms of R.C. 505.49(A), where such a district has been created, the township trustees of a non-civil-service township may, by a two-thirds vote, adopt rules and regulations for the operation of the district, including a determination of the qualifications of the chief of police, patrolmen and other police force members. It would, therefore, appear that an individual of the age of eighteen years is eligible for appointment to a township district police force, absent a regulation adopted by a two-thirds vote of the trustees establishing a higher age requirement.

In specific answer to your question, it is my opinion, and you are so advised that:

- 1) R.C. 124.41 requires that all persons originally appointed as policemen or policewomen in a city or civil service township police department be at least twenty-one years of age.
- 2) R.C. 737.15 and 737.16 permit the appointment of otherwise qualified persons of the age of eighteen to the offices of village marshall, deputy marshall, policeman, night watchman and special policeman.
- 3) R.C. 311.04 permits the appointment of an otherwise qualified person of the age of eighteen to the office of deputy sheriff.
- 4) R.C. 509.01 and 505.49 permit the appointment of otherwise qualified persons of the age of eighteen to township police positions, unless, in the operation of a police district pursuant to R.C. 505.48 et seq., the board of trustees under R.C. 505.49 has acted by a two-thirds vote to establish a higher age requirement.

#### OPINION NO. 78-059

#### Syllabus:

The Internal Security Committee, established by the Industrial Commission and the Bureau of Workers' Compensation pursuant to R.C. 4121.22(D), is a public body for purposes of R.C. 121.22.

To: **William W. Johnston, Chairman, The Industrial Commission of Ohio,  
Columbus, Ohio**

By: **William J. Brown, Attorney General, October 25, 1978**

I have before me your request for a formal opinion. It provides as follows:

The Industrial Commission of Ohio and the Bureau of Workers' Compensation have established the Internal Security Committee as mandated by Revised Code Section 4121.122(D). The issue has arisen as to whether or not this joint committee is a public body as defined in Revised Code Section 121.22.

Therefore, we are requesting your opinion as to whether or not the Internal Security Committee is a public body under the guidelines established in Revised Code Section 121.22.

Further, we request your opinion based upon your answer to the above question to what extent the actions of the Internal Security Committee come under the mandates of Section 121.22.

R.C. 121.22, popularly known as the "sunshine law", provides in part as follows:

(B) As used in this section:

(1) "Public body" means any board, commission, committee, or similar decision-making body of a state agency, institution or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.

. . .

(C) All meetings of any public body are declared to be public meetings open to the public at all times.

Its sweeping scope notwithstanding, the foregoing definition has presented certain difficulties. Most notably, problems have arisen in determining whether a particular agency or institution is governmental in nature and whether a particular board or committee is a decision-making body.

In 1976 Op. Att'y Gen. No.76-062, I concluded that the board of trustees of a Comprehensive Mental Health Center did not constitute a public body for purposes of R.C. 121.22. In so concluding, I observed that the center was a privately created non-profit corporation the powers of which were defined not by statute but by its articles of incorporation. In addition, I noted that the trustees of the center possessed none of the characteristics commonly associated with public officials. Thus, the board did not fall within the purview of the statute as expressed in its introductory provision, which calls for a liberal construction requiring "public officials to take official action . . . only in open meetings."

The Internal Security Committee, however, is on a significantly different footing from the board considered in Op. No. 76-062, *supra*. An examination of the nature and composition of the committee reveals that it is possessed of none of the characteristics that I found determinative of private status in the case of a community mental health center.

R.C. 4121.122, which creates the Internal Security Committee, provides in part

as follows:

(D) The commission and the administrator shall appoint a six-member internal security committee composed of three commission employees appointed by the commission. The administrator shall supply to the committee the services of trained investigative personnel and clerical assistance necessary to the committee's duties. The committee shall investigate all claims or cases of criminal violations, abuse of office, or misconduct on the part of bureau or commission employees and shall conduct a program of random review of the processing of workers' compensation claims.

The committee shall deliver to the administrator, the industrial commission, or the governor, any case for which remedial action is necessary. The committee shall maintain a public record of its activities, insuring that the rights of innocent parties are protected, and, once every six months shall report to the governor, the general assembly, the administrator, and industrial commission, the committee's findings, and the corrective actions subsequently taken in cases considered by the committee.

Thus, the Internal Security Committee is a statutorily created committee of the Industrial Commission and the Bureau of Workers' Compensation. Both the commission and the bureau are governmental agencies. The committee thus qualifies as a "committee . . . of a state agency. . ."

The only remaining issue to be considered is whether the committee is, in fact, a decision-making body.

The Internal Security Committee does not occupy the status of a subordinate agency or committee, the only function of which is to make recommendations to its parent organization. Such an advisory committee, it might be argued, does not qualify as a decision-making body in the strict sense of the term. But cf. Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (the provisions of an open-meeting statute substantially similar to R.C. 121.22 was held to apply to meetings of a citizens' planning committee that was appointed by a town council); Cathcart v. Andersen, 10 Wash. App. 429, 517 P. 2d 980 (1974) (open meeting statute held applicable to all committee meetings of a university board of trustees). Although the status of such advisory committees under R.C. 121.22 is problematic, the issue need not be considered in the present analysis. The Internal Security Committee, even though comprised of appointees of the Bureau of Workers' Compensation and the Industrial Commission, is more than an informal advisory committee. It is a statutorily created, independent entity that performs expressly defined duties of an ongoing nature. As such, it differs fundamentally from an informal, ad-hoc committee created by and for the convenience of a parent body.

It is true that the decisions made by the committee involve little more than the investigation of commission and bureau personnel. It is not, for instance, authorized to take final disciplinary action with respect to the subjects of the investigations that it conducts. There is, however, nothing in the language of R.C. 121.22 that would suggest that the scope of the statute is limited to entities authorized to render final decisions of the type that fundamentally affect the rights of individuals. The decisions made by the committee, however provisional or removed from the rights of the parties involved are, nonetheless, decisions. I must, therefore, conclude that the Internal Security Committee is a decision-making body as that term is used in R.C. 121.22.

Finally, it should be noted that since the members of the committee are vested with statutory authority, they exercise certain sovereign powers that establish them as public officers. See, Herbert v. Ferguson, 142 Ohio St. 496, 501

(1944). Since R.C. 121.22 must be liberally construed to require public officers to conduct official business in open-meetings, the inclusion of the Internal Security Committee within the terms of the statute is entirely appropriate.

The fact that the committee is a public body for purposes of R.C. 121.22 does not, however, mean that all of its deliberations must categorically be conducted openly. Reflecting a legislative attempt to strike a balance between the public's desire for access and the government's need for secrecy, R.C. 121.22 authorizes executive sessions in several well defined instances. The committee is, of course, free to take full advantage of such exceptions.

In answer to your question, it is my opinion and you are so advised that the Internal Security Committee, established by the Industrial Commission and the Bureau of Workers' Compensation pursuant to R.C. 4121.122(D), is a public body for purposes of R.C. 121.22.

### OPINION NO. 78-060

#### Syllabus:

A board of county commissioners has the authority to establish a self-insurance trust fund to protect county hospitals from liability under R.C. 2734.02 and 339.06. These statutes in conjunction with R.C. 307.85 provide the authority for a board of county commissioners to enter into a trust agreement whereby legal title to the self-insurance fund is transferred to an independent fiduciary to administer the fund as required by federal medicare and medicaid reimbursement programs.

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To: John E. Shoop, Lake County Pros. Atty., Painesville, Ohio  
By: William J. Brown, Attorney General, November 16, 1978

I have before me your request for my opinion regarding the following question:

The Lake County Commissioners on behalf of the Lake County Memorial Hospitals would like to establish a self-insurance trust fund to protect against potential hospital liability. Associated with the self-insurance trust fund are Medicare requirements that the trust fund be administered by an independent fiduciary such as a bank or a trust company.

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Therefore, I respectfully request an opinion from your office to the following question:

Can legal title of public funds be turned over to an independent fiduciary (trustee), to be secured in a manner provided by Section 135.18 of the Ohio

Revised Code, to provide a self-insurance trust fund?

In 1976 the Ohio General Assembly passed the Court of Claims Act and thereby waived the state's defense of sovereign immunity. R.C. 2743.02(B) specifically "waives immunity from liability of all hospitals owned or operated by one or more political subdivisions." R.C. 2743.02(C) further provides that "[a]ny hospital . . . may purchase liability insurance covering its operators and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees . . ." The language of the section does not expressly authorize the establishment of a self-insurance trust fund, but R.C. 2743.02(C) does specify procedures and requirements for obtaining insurance coverage in the following language:

Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary in the exercise of sound and prudent actuarial judgment, to cover such potential expense fees, damage, loss, or other liability . . . This authority is in addition to any authorization otherwise provided or permitted by law.

Consequently, the express provision of R.C. 2743.02 authorizes the establishment of a self-insurance fund. There is, however, no express statutory authority to create or enter into a trust agreement, whereby an independent trustee would be needed to manage and have legal title to such funds.

Without express statutory authority to enter into such an agreement county commissioners may do so only if the authority to enter into an insurance trust agreement is necessarily implied from relevant statutory provisions. State, ex rel. Clarke v. Coak, 103 Ohio St. 465 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916); Gorman v. Heuck, 41 Ohio App. 453 (1931); 1975 Op. Att'y Gen. No. 75-070.

R.C. Chapter 339 sets forth the statutory foundation for the establishment of hospitals under the direction of boards of county commissioners. Under the provisions of this chapter the actual control and management of these hospitals is given to an appointed board of county hospital trustees. R.C. 339.06 addresses the powers and duties of the board of county trustees and provides in pertinent part that "[t]he board may designate the amounts and forms of insurance protection to be provided, and the board of county commissioners shall secure such protection." This section would certainly provide authority for a board of county commissioners to create a self-insurance trust. The question posed by your request, however, pertains to the authority to transfer legal title to such self-insurance trust funds. R.C. 339.08 provides for the establishment of a hospital trust fund but not for purposes of self-insurance. The county hospital trustees are given the authority to become successor trustees for property given to the county hospital. The authority to transfer funds to an independent fiduciary as trustee could not be necessarily implied from this section. Furthermore, I am unaware of any statutory authorization for a county hospital to transfer legal title to funds to an independent fiduciary for purposes of self-insurance.

The provisions of R.C. 307.85, however, as discussed in 1971 Op. Att'y Gen. No. 71-092 and in 1977 Op. Att'y Gen. No. 77-025 may, under circumstances, provide that authority. R.C. 307.85 permits counties to take actions necessary to qualify for participation in federal programs. The section provides as follows:

(A) The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

This section, as construed by the above cited Opinions of this office, authorizes a board of county commissioners to perform acts not otherwise statutorily authorized where the performance of the act is reasonably related to the establishment and operation of a program created by federal law.

In your request letter you indicate that the Medicare program has several requirements for administration of a self-insurance program. The Medicare program is designated to give reimbursement to hospitals for costs necessarily incurred to provide protection against malpractice and comprehensive general liability. The Medicare and Medicaid Guide (CCH) sets forth the types of self-insurance coverage which may be reimbursed under the plan.

The conditions for Medicare reimbursement stated below are exclusively for provider malpractice liability and comprehensive general liability coverage in conjunction with malpractice coverage or for malpractice liability coverage only and not for liability coverage costs such as automobile liability, fire, theft, workmen's compensation, or general liability only. (1974) 1 Medicare and Medicaid Guide (CCH) Prov. Reimb. Man., Part 1, §2162 (¶5999X-25)

The conditions applicable to a reimbursible self-insurance plan read, in pertinent part as follows:

- A. Self-Insurance Fund. - The provider or pool establishes a fund with a recognized independent fiduciary such as a bank or a trust company. The provider or pool and fiduciary enter into a written agreement which includes all of the following elements:
  1. General Legal Responsibility. - The fiduciary agreement must include the appropriate legal responsibilities

and obligations required by State laws.

2. Control of Fund. - The fiduciary must have legal title to the fund and be responsible for proper administration and control. The fiduciary cannot be related to the provider either through ownership or control as defined in Chapter 10 [¶5679 et seq.] of this manual. Thus, the home office of a chain organization or religious order of which the provider is an affiliate cannot be the fiduciary. In addition, investments which may be made by the fiduciary from the fund are limited to those approved under State law governing the use of such fund; notwithstanding this, loans by the fiduciary from the fund to the provider or persons related to the provider are not permitted . . . . [1974] 1 Medicare and Medicaid Guide (CCH) Prov. Reimb. Man., Part I §2162.7, (¶5999X-32).

Pursuant to these requirements, the establishment of a self-insurance trust fund requiring the transfer of legal title of such funds to the trustee is a requirement reasonably related to participation in the federal program. I am, therefore, of the opinion that the provisions of R.C. 307.85 in conjunction with R.C. 339.06 provides the requisite authority to the board of county commissioners to enter into a self-insurance trust agreement with an appropriate bank or trust company.

It must be noted, however, that the grant of authority under R.C. 307.85 is made contingent on the fact that the act contemplated not be "prohibited by the Constitution of Ohio nor in conflict with the laws of this state." I am unaware of any provisions of the Ohio Constitution or laws of this state which would be in conflict with the establishment of a self-insurance trust fund or the transfer of legal title to such a fund to an appropriate bank or trust company.

At this point reference must be made to R.C. 339.06 where it is stated that:

[t]he board may deposit funds not needed for immediate expenses in interest bearing or noninterest bearing accounts. Such banks or trust companies shall furnish security for all such deposits, whether interest bearing or noninterest bearing, to the extent and in the manner provided in section 135.18 of the Revised Code, but no such deposit shall otherwise be subject to the provisions of section 135.01 to 135.21, inclusive, of the Revised Code. (Emphasis added.)

Implicit in your question is the assumption that the transfer of funds to an independent fiduciary falls under the category

of a deposit of funds "not needed for immediate expenses," thereby requiring security for the repayment of such deposits as set forth in R.C. 135.18. It could be argued that insurance costs, either in the form of premium payments on a commercial policy or a lump sum transfer to a self-insurance fund trustee, represent an operating expense of the institution thus eliminating the requirement of compliance with R.C. 135.18. As this issue is not raised in your opinion request, however, further discussion is unnecessary.

Accordingly, it is my opinion and you are so advised that a board of county commissioners has the authority to establish a self-insurance trust fund to protect county hospitals from liability under R.C. 2734.02 and 339.06. These statutes in conjunction with R.C. 307.85 provide the authority for a board of county commissioners to enter into a trust agreement whereby legal title to the self-insurance fund is transferred to an independent fiduciary to administer the fund as required by federal medicare and medicaid reimbursement programs.

#### OPINION NO. 78-061

#### Syllabus:

A city board of education may lawfully refuse to contribute to a municipal civil service commission which has billed the board of education pursuant to R.C. 124.54. Furthermore, the ratio referred to in Section 124.54 merely places a maximum on the amount a board of education may contribute, but a city board of education may, in its discretion, appropriate a lesser amount than is provided in that section.

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**To: Peter R. Seibel, Defiance County Pros. Atty., Defiance, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for an opinion regarding R.C. 124.54. That section provides:

Where municipal civil service commissions act for city school districts of the cities for which they are appointed, the boards of education of such city school district may, by resolution, appropriate each year, to be paid into the treasury of such city, a sum sufficient to meet the portion of the board of education's cost of civil service administration as determined by the ratio of the number of employees of such board in the classified service to the entire number of employees in the classified service in all political divisions administered by such commission.

Specifically, you have asked the following questions:

1. Is it mandatory under R.C. 124.54, that a city board of education contribute to the cost of administration of a municipal civil service commission?
2. Is the ratio referred to in R.C. 124.54 the only permissible contribution the municipal civil ser-

vice commission can receive, or may it accept a lesser amount from the city board of education?

The primary and paramount rule in the interpretation and construction of statutes is to determine and give effect to the intention of the General Assembly. Toledo v. Public Utilities Commission, 135 Ohio St. 57 (1939). In R.C. 124.54, the legislature has stated that a city board of education "may" contribute a sum sufficient to meet the portion of the board of education's cost of civil service administration.

The statutory use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary, Dennison v. Dennison, 165 Ohio St. 146 (1956), at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation, State, ex rel. John Tague Post, v. Klinger, 114 Ohio St. 212 (1926).

The rule that a statute which speaks in terms of "may" is permissive is a qualified one. The word "may" sometimes requires a mandatory construction, as where the sense of the entire statute under consideration requires such. Sun Oil Co. v. Ohio Turnpike Comm., 57 Ohio Ops. 199 (C.P. 1954). Whether it is to be so read depends upon a fair construction of the statute. Stanton v. Frankel Bros. Realty Co., 117 Ohio St. 345 (1927). It has been stated that such construction will never be invoked except when it is necessary in order to give effect to the clear policy and intention of the legislature to impose a positive and absolute duty. Roetlinger v. Cincinnati, 16 Ohio App. 273 (1922).

The word "may" will not be given the meaning of "shall" or "must" where it is apparent from the whole section or statute that such was not the legislative intention. Osborn v. Lidy, 51 Ohio St. 90 (1894).

Municipal Civil Service Commissions are established pursuant to R.C. 124.40, which section provides, in pertinent part, as follows:

(A) The mayor or other chief appointing authority of each city in the state shall appoint three persons . . . who shall constitute the municipal civil service commission of such city and of the city school district and city health district in which such city is located. . . . The municipal civil service commission shall exercise all other powers and perform all other duties with respect to the civil service of such city, city school district, and city health district, as prescribed in this chapter and conferred upon the director of administrative services and the state personnel board of review with respect to the civil service of the state . . . The expenses and salaries of a municipal civil service commission shall be determined by the legislative authority of the city and a sufficient sum of money shall be appropriated each year to carry out this chapter in the city . . . (Emphasis added.)

Thus, the legislative authority of the city has the clear responsibility to provide "sufficient" funds so that the municipal civil service commission can exercise its powers and duties under this section. It follows that such civil service commissions look primarily to that legislative authority for their funds, and not to the city school district or city health district for which it also acts.

Thus, the legislature has not expressed a clear policy and intention to impose a positive and absolute duty upon a board of education of a city school district to contribute to the cost of administration of such municipal civil service commissions. Therefore the word "may" as used in R.C. 124.54, should be given its general construction of making the provision optional rather than mandatory.

It being optional whether a city board of education contributes at all to the cost of administration of a municipal civil service commission, it follows that the board has similar discretion in deciding whether it will contribute the maximum share outlined by the ratio formula suggested in R.C. 124.54.

As that section alone empowers a board of education to make such contribution, that board is empowered to contribute only to the maximum specified in the ratio formula. It can not exceed that amount. However, it can, at its discretion, resolve to appropriate any amount inclusive of the statutory extremes of no contribution at all and the maximum contribution based on a ratio outlined in the statute.

Thus, it is my opinion, and you are so advised that a city board of education may lawfully refuse to contribute to a municipal civil service commission which has billed the board of education pursuant to R.C. 124.54. Furthermore, the ratio referred to in Section 124.54 merely places a maximum on the amount a board of education may contribute, but a city board of education may, in its discretion, appropriate a lesser amount than is provided in that section.

#### OPINION NO. 78-062

#### Syllabus:

The term "practitioner" as defined in R.C. 3719.01(BB) and R.C. 4729.02(H) includes persons exempt under R.C. 4731.36 from the provisions of R.C. Chapter 4731. An Ohio pharmacist may, therefore, fill an order for drugs issued by a person enumerated within R.C. 4731.36.

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**To: Franklin Z. Wickham, Executive Director, State Board of Pharmacy,  
Columbus, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for my opinion as to whether an Ohio pharmacist may legally fill a prescription written by a practitioner who falls within the exemptions set forth in R.C. 4731.36.

Your request necessitates an analysis of the definitions of several terms used in R.C. Chapter 4729, which regulates the pharmacy profession, and R.C. Chapter 3719, which regulates the possession and sale of dangerous drugs and controlled substances. The term "prescription" is defined, for the purposes of R.C. Chapter 3719, in R.C. 3719.01(CC) as follows:

"Prescription" means a written or oral order for a controlled substance for the use of a particular person or a particular animal given by a practitioner in the course of professional practices and in accordance with the regulations promulgated by the Director of the United States drug enforcement administration, pursuant to the federal drug abuse control laws.

For the purposes of R.C. Chapter 4729, a prescription "means an order for drugs or combinations or mixtures thereof, written or signed by a practitioner or transmitted by a practitioner to a pharmacist by word of mouth, telephone, telegraph, or other means of communication and recorded in writing by the pharmacist." R.C. 4729.02(G) While the definitions of prescription vary, the significant common feature is that a prescription must be issued by a practitioner.

For the purposes of R.C. Chapter 3719, practitioner "means a person who is licensed pursuant to Chapter 4715 [dentists], 4731 [physicians and limited practitioners], or 4741 [veterinarians] of the Revised Code and authorized by law to write prescriptions for drugs or dangerous drugs." R.C. 3719.01(BB). The definition of practitioner set forth in R.C. 4729.04(4) does not differ in any material respect from that set forth in R.C. 3719.01(BB).

A careful reading of these definitional provisions requires one to conclude that in order for an order for drugs to meet the definition of a prescription under Ohio law the order must be issued by a person licensed pursuant to R.C. Chapters 4715, 4731 or 4741, and authorized by law to write prescriptions for drugs. The issue presented by your question, therefore, is whether those persons exempted from the licensing requirements of R.C. Chapter 4731, by R.C. 4731.36, are nevertheless "licensed" for purposes of the statutory definition of "practitioner". R.C. 4731.36 provides in pertinent part as follows:

[R.C. 4731.01 to 4731.47, inclusive] shall not apply to a commissioned medical officer of the United States army, navy, or marine hospital service in the discharge of his professional duties, or to a regularly qualified dentist when engaged exclusively in the practice of dentistry, or when administering anaesthetics, or a physician or surgeon residing in another state or territory who is a legal practitioner of medicine or surgery therein, when in consultation with a regular practitioner of this state; nor shall such sections apply to a physician or surgeon residing on the border of a neighboring state and authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; provided equal rights and privileges are accorded by such neighboring state to the physicians and surgeons residing on the border of this state contiguous to such neighboring state.

Since the persons enumerated in R.C. 4731.36 are exempt from the provisions of R.C. Chapter 4731, such persons may practice medicine or surgery within this state without a certificate from the state medical board. Since the practice of medicine, which is defined in R.C. 4731.34, includes prescribing drugs, it is reasonable to conclude that these persons are authorized to prescribe drugs in Ohio. As indicated previously, however, whether an order for drugs constitutes a prescription under Ohio law depends in part upon a two-fold test of the authority of the person issuing the order. The person issuing the order must be both authorized by law to write prescriptions and licensed pursuant to R.C. Chapters 4715, 4731 or 4741.

The intent of the General Assembly in enacting this latter requirement is not clear since the term "licensed" is subject to differing interpretations. The term "license" generally means the permission granted by some competent authority to do some act which would otherwise be illegal. *State ex rel Zugravu v. O'Brien*, 130 Ohio St. 23 (1935); *Shady Acres Nursing Home, Inc. v. Canary*, 29 Ohio App.2d 47 (Franklin County 1973). The same term may, however, be used in a more specific sense in which it refers to the certificate or the document which represents the permission granted. See, *Aldrich v. City of Syracuse*, 236 N.Y.S. 614, 134 Misc. 698 (1925). This distinction is significant to the issue you present. If the requirement that a person be licensed pursuant to R.C. Chapter 4731 is interpreted in accordance with the general meaning of the term "license," the persons enumerated in R.C. 4731.36 meet the definition of "practitioner" since they are permitted to practice medicine and surgery within this state. If, however, the more specific interpretation is applicable, then, such persons do not fall within the definition since they lack a proper certificate.

Pursuant to R.C. 1.47, it is presumed that in enacting a statute, the General

Assembly intended a just and reasonable result. Since, by exempting the persons enumerated in R.C. 4731.36 from the provisions of R.C. Chapter 4731, the General Assembly has given them permission to prescribe drugs in this state, it is not reasonable to conclude that the General Assembly intended that their orders for drugs would not constitute prescriptions under Ohio law. For this reason, it is my opinion that the phrase "licensed" as used in the statutory definition of a "practitioner" set forth in R.C. 3719.01(BB) and R.C. 4729.02(H), encompasses all persons who are permitted to practice medicine or surgery under the laws of this state.

Two qualifications must be noted, however. First, the intent of the General Assembly in using the term licensed may vary depending upon the context. My analysis of this term has significance only for those statutes expressly noted. Second, the sale of drugs by a pharmacist is also regulated by federal law. See eg., "Federal Food, Drug and Cosmetic Act," 52 Stat. 1040, (1938), 21 U.S.C. §301, as amended. My opinion as to the validity of a prescription under Ohio law does not relieve a pharmacist of his duty to comply with an obligation, restriction or regulation imposed by federal law.

In specific answer to your question, it is my opinion and you are so advised that the term "practitioner" as defined in R.C. 3719.01(BB) and R.C. 4729.02(H) includes persons exempt under R.C. 4731.36 from the provisions of R.C. Chapter 4731. An Ohio pharmacist may, therefore, fill an order for drugs issued by a person enumerated within R.C. 4731.36.

#### OPINION NO. 78-063

##### Syllabus:

1. A county coroner who testifies in a county other than the county in which he holds office, as to observations made in his official capacity, is entitled to witness fees prescribed by R.C. 2335.06 and R.C. 2335.08.
2. A county coroner who testifies in a county other than the county in which he holds office, as to observations made in his official capacity, is not entitled to expert witness fees.

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**To: Roger R. Ingraham, Medina County Pros. Atty., Medina, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for my opinion, which reads as follows:

Ohio Revised Code Sections 2235.06 and 2335.08 provide for the compensation of witnesses in civil and criminal cases respectively. The rate of compensation is twelve (12) dollars per day for a full day's attendance and six (6) dollars per day for one-half day's attendance.

A question has been raised concerning the fee due a County Coroner who testifies for the State in a criminal case. Is a County Coroner, who testifies by deposition in a county other than the county in which he holds office, as to observations made in his official capacity in a criminal case, entitled only to those witness fees prescribed in the above-mentioned Revised Code sections, or may he demand and receive witness fees as are deemed just and proper for an expert witness? If the County Coroner can command compensation as an expert witness, who is responsible for payment of such a fee and from what source shall it come?

R.C. 2335.06(A) sets the amount of fees as follows:

Each witness in civil cases shall receive the following fees:

(A) Twelve dollars for each full day's attendance and six dollars for each half day's attendance as a court of record, mayor's court, or before a person authorized to take depositions, to be taxed in the bill of costs. Each witness shall also receive ten cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony, to be taxed in the bill of costs.

R.C. 2335.08 provides, in pertinent part, as follows:

Each witness attending, under recognizance or subpoena issued by order of the prosecuting attorney or defendant, before the grand jury or any court of record, in criminal causes, shall be allowed the same fees as provided by section 2335.06 of the Revised Code in civil causes . . .

R.C. 307.52 provides for payment of fees to expert witnesses upon application of the prosecuting attorney. Payment of fees pursuant to that section requires approval of both the court and the board of county commissioners.

An answer to your request first requires a consideration of whether or not county officials are entitled to witness fees.

Both R.C. 2335.06 and R.C. 2335.08 allow certain fees to "each witness." Neither section makes a distinction between witnesses who are public officials and witnesses who are not. An examination of the Revised Code reveals no statutory prohibition against county officials collecting such fees. In the absence of any such prohibition, the general rules set forth in State, ex rel. Shaffer, v. Cole, 132 Ohio St. 338 (1937), applies. In that case, the Supreme Court determined that:

In approaching this problem it is helpful to remember the general rule that when a public officer, in the discharge of his official duties, is not required to be present in person upon the trial of a particular case, he is entitled to the same fees as any private person if he is called as a witness therein.

The word "required" has been interpreted to mean only those officers, such as the sheriff or the clerk of courts, who are under a statutory duty to attend all sessions of the court. See, 1941 Op. Att'y Gen. No. 3854, p. 438-445; 1955 Op. Att'y Gen. No. 5677, p. 409-418. Because a county coroner who testifies for the State in a criminal case in a foreign county is not an officer who is "required to be present in person upon the trial of a particular case," it is my opinion that such an officer is entitled to the fees prescribed by R.C. 2335.06 and R.C. 2335.08, supra.

The question as to whether the county coroner may demand and receive his witness fee is separate and distinct from the question of his right to retain it for his own use. However, the ultimate disposition of the statutory witness fees paid to a public officer is not raised by your question, and therefore not considered.

The second part of your question concerns whether or not the county coroner may demand and receive expert witness fees when testifying in a county other than the county in which he holds office.

In 1955 Op. Att'y Gen. No. 5677, p. 409, one of my predecessors was faced with a similar question. That opinion considered the issue of whether Dr. B., then Superintendent of the Lima State Hospital for the Criminally Insane, could demand and receive expert witness fees for his testimony in a criminal case. Dr. B., a court appointed psychiatrist, testified as to the defendant's sanity. My predecessor concluded that:

It is my opinion that the fact of state employment alone does not prevent Dr. B. from receiving a fee. So long as he is not testifying as to a matter within the scope of his official duties, he stands in the same position as any other expert witness appointed under the statute. Section 2945.40, Revised Code, provides that when the present sanity of a defendant is in question he may be referred to the Lima State Hospital for observation. In such a case I do not believe that Dr. B. would be entitled to an expert's fee for testifying as to the results of his official observation. But when he is appointed only in his capacity as a qualified physician, there is no reason why the fee should not be paid simply because he happens to be a state employee. (emphasis added)

While Dr. B. testified only in his private capacity as a qualified physician, it is clear from the information you have provided that the county coroner is to testify as to observations made in his official capacity. Moreover, the information which the coroner is to provide in his testimony was gathered in his official capacity. Accordingly, under the test set out in the 1955 opinion, *supra*, the coroner would not be entitled to expert witness fees as his testimony would concern observations made and information gathered in the scope of his official duties.

Therefore, in specific answer to your question, it is my opinion and you are so advised that:

1. A county coroner who testified in a county other than the county in which he holds office, as to observations made in his official capacity, is entitled to witness fees prescribed by R.C. 2335.06 and R.C. 2335.08.
2. A county coroner who testifies in a county other than the county in which he holds office, as to observations made in his official capacity, is not entitled to expert witness fees.

#### OPINION NO. 78-064

#### Syllabus:

Pursuant to R.C. 3501.17, a board of county commissioners is authorized to procure insurance to protect members of the board of elections from liability arising from the exercise of their official duties. However, the determination of whether such insurance is a "necessary and proper" expense of the board of elections is within the sound discretion of the board of county commissioners.

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**To: Ted W. Brown, Secretary of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for my opinion which raises the following question:

Is the premium cost for insurance for members of Boards of Elections, protecting them against liability arising from the performance of their official duties a "necessary and proper" expense of the Board under Section 3501.17 of the Revised Code?

R.C. 3501.17 provides, in pertinent part, as follows:

The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in same

manner as other county expenses are made. If the board of county commissioners fails to appropriate an amount sufficient to provide for the necessary and proper expenses of the board, such board may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and such amount shall be appropriated. . . .

Such board may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and such amount shall be appropriated. . . .

The entire compensation of the members of the board of elections and of the clerk, deputy clerk, and other assistants and employees in the board's offices . . . shall be paid in the same manner as other county expenses are paid . . . (Emphasis added.)

The compensation of members of the board of elections is determined by the population of the county in accordance with R.C. 3501.12. R.C. 3501.141 specifically allows the board of elections to purchase health and hospitalization insurance, and when so purchased, the county commissioners are required to pay the premiums. However, there is no specific statutory authorization for the purchase of the type of insurance which you describe.

Am. Sen. Bill No. 423, which became effective on May 2, 1978, added the following language to R.C. 307.441:

(E) The board of county commissioners of each county may procure a policy or policies of insurance insuring any county employee against liability arising from the performance of his official duties . . . (Emphasis added.)

The section specifically lists those county officials for whom the commissioners may purchase such insurance. Included are the recorder, treasurer, coroner, engineer, prosecuting attorney, auditor, sheriff, as well as the county commissioners themselves. However, no mention is made of the members of the Board of Elections, and under the maxim of statutory construction, expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another) if must be presumed that the General Assembly did not intend to grant to county commissioners the authority to purchase such insurance for board members unless they can be said to be "county employees."

Members of the various boards of elections are appointed to four year terms by the Secretary of State. R.C. 3501.06. The duties of the board members are set forth by statute in R.C. 3501.11. The members are required to take an oath office. R.C. 3501.08. Accordingly, the Supreme Court specifically held that a member of the board of elections is an officer, and not an employee. State, ex rel Milburn, v. Pethel, 153 Ohio St. 1 (1950). In fact, the implication of Pethel is that board members are state officers rather than county officers. See also, 1968 Ops. Att'y Gen. No. 68-105. 1971 Ops. Att'y Gen. No. 71-085. Therefore, R.C. 307.441, as amended by Am. Sen. Bill No. 423 offers no authority whatsoever for the purchase of the liability insurance you describe for members of boards of election. If any authority exists for such an expenditure, it must be found in the "necessary and proper" clause of R.C. 3501.17, supra.

The "necessary and proper" clause of R.C. 3501.17 has not been the subject of much litigation. In State, ex rel. Ball, v. Board of County Commissioners, 159 Ohio St. (1943) it was held that the provision of R.C. 3501.17, which requires the county commissioners to pay amounts found necessary by the court of common pleas, is mandatory. Nevertheless, there was no discussion of what is "necessary and proper," since the expenditure involved was required to carry out a statutory

mandate. Moreover, while there have been previous opinions of this office on the "necessary and proper" clause, none has really analyzed the language with any refinement. It is clear that expenses required to fulfill a statutory duty of the board are "necessary and proper." Beyond those expenses, the system contemplated by R.C. 3501.17 depends largely upon the discretion of county commissioners, and ultimately upon the decision of the common pleas court. If the county commissioners determine that such premiums are "necessary and proper" they are authorized to make such payment. However, as such a determination is within the sound discretion of the commissioners, they can not be forced to procure such insurance unless ordered to do so by the court of common pleas.

Accordingly, it is my opinion, and you are so advised that:

Pursuant to R.C. 3501.17, a board of county commissioners is authorized to procure insurance to protect members of the board of elections from liability arising from the exercise of their official duties. However, the determination of whether such insurance is a "necessary and proper" expense of the board of elections is within the sound discretion of the board of county commissioners.

#### OPINION NO. 78-065

#### Syllabus:

"Pick up" payments made to the State Teachers' Retirement System by an employer on behalf of an employee are not included in adjusted gross income and are accordingly not subject to the Ohio personal income tax.

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**To: James L. Sublett, Executive Director, State Teachers Retirement System of Ohio, Columbus, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for my opinion in which you ask whether employee contributions to the State Teachers Retirement System (STRS) "picked up" by the employer constitute taxable income to such employees for the purpose of the Ohio income tax.

In 1978 Op. Att'y Gen. No. 78-049, I concluded that "an employer is permitted to 'pick up' part or all of the teacher contributions required to be made to the State Teachers Retirement System pursuant to R.C. 3307.51." However, that opinion did not discuss the effect of such payments upon the employee for the purpose of the Ohio income tax. Therefore, it is necessary to analyze R.C. Chapter 5747, which establishes the Ohio personal income tax.

R.C. 5747.02 imposes the Ohio personal income tax upon individuals based on their adjusted gross income. R.C. 5747.01(A) states that "adjusted gross income" is adjusted gross as defined in the Internal Revenue Code of 1954 (hereinafter "code") with certain modifications irrelevant to this discussion. If "pick up" payments are to be considered adjusted gross income for the purpose of R.C. 5747.02, they must also be includible in adjusted gross income pursuant to the Code.

In Rev. Rul. 77-462, the Internal Revenue Service declared that when an employer-school district assumes and pays required teacher contributions to a pension plan, qualified under §§401 and 501 of the Code, such payment would not be included as income to the employee until distribution of the benefits upon retirement or termination, pursuant to Code §402(a). Because such payments are

not income at the time they are made for the purpose of the federal income tax, they are not includible in an individual's adjusted gross income for the purpose of the Ohio personal income tax. Therefore, I conclude that "pick up" payments made to the State Teachers' Retirement System by an employer on behalf of an employee are not included in adjusted gross income of the employee and are accordingly not subject to the Ohio personal income tax.

Therefore, it is my opinion, and you are so advised, that "pick up" payments made to the State Teachers' Retirement System by an employer on behalf of an employee are not included in adjusted gross income and are accordingly not subject to the Ohio personal income tax.

### OPINION NO. 78-066

#### Syllabus:

Legal title to stock of a professional association may be held by a trustee of a qualified pension or profit sharing plan, licensed to render the same professional service as that for which such association was organized, as long as equitable title to the stock is also held by such professionals.

**To: Ted W. Brown, Secretary of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, December 20, 1978**

I have before me your request for my opinion which reads, in pertinent part, as follows:

We request your opinion as to whether, under Ohio professional association law, legal title to stock of a professional association can be held by a trustee of a qualified pension or profit sharing plan for the benefit of a licensed professional.

Prior to the enactment of R.C. Chapter 1785 by the General Assembly in 1961, Ohio courts uniformly held that incorporation by professionals for the purpose of carrying on a practice was forbidden under Ohio law. See, e.g., State v. Myers, 128 Ohio St. 366 (1934); Title Abstract & Trust Co. v. Dwonker, 129 Ohio St. 23 (1934); State, ex rel. Green v. Brown, 173 Ohio St. 114 (1962); 1952 Op. Att'y Gen. No. 1751; 1961 Op. Att'y Gen. No. 2495. While R.C. Chapter 1785 has, in large part, removed this impediment, it has also placed certain conditions and restrictions upon professional corporations. R.C. 1785.02 and 1785.05 permit only licensed professionals to be stockholders in professional corporations. Specifically, R.C. 1785.05 provides as follows:

A professional association may issue its stock only to persons who are duly licensed or otherwise legally authorized to render the same professional service as that for which the association was organized. (emphasis added)

R.C. 1785.07 imposes a similar restriction upon the sale or transfer of stock in a professional corporation.

Your inquiry concerns whether, in light of such restrictions, a professional association incorporated under Ohio law may transfer its shares to the trustee of a pension or profit sharing plan and trust qualified under §§401 and 501(a) of the Internal Revenue Code of 1954. Presumably, stock of the professional association would be issued to the plan trustee to fund the benefits accruing to an individual under the plan. In order to determine whether such issuance or transfers comport with R.C. 1785.02, 1785.05 and R.C. 1785.07, it is necessary to analyze the nature of ownership of trust property. Ownership of property held in trust is not lodged within the trust. Rather, the legal title to the trust res is vested in the trustee. 1

Bogert, Trusts and Trustees, §1 (2d ed., 1965). Equitable title is vested in the beneficiary. Robbins v. Smith, 72 Ohio St. 1 (1905); Bogert, supra, §1. Therefore, the ownership of property held in trust is split between the legal title of the trustee and the equitable title of the beneficiary. Accordingly, stock in a professional association may be transferred in trust where both the trustee and the beneficiary are "persons duly licensed or otherwise legally authorized to render the same professional service for which the association was organized." This result has been suggested by one commentator. See, Smith, Professional Corporations in Ohio: The Time for Statutory Revision, 30 Ohio St.L.J. 439, 456 (1969). Moreover, Attorneys General in Georgia and Michigan have reached the same conclusion after analyzing professional corporation statutes similar to R.C. Chapter 1785. See, 1975 Op. Att'y Gen. of Georgia No. 75-61; 1978 Op. Att'y Gen. of Michigan No. 5285. Where the trustee is not such a licensed professional, stock of a professional corporation may not be transferred to him. Such a transfer vests the legal title to the stock of a professional association in a person not licensed to perform the professional service for which the association was organized, in contravention of R.C. 1785.02, 1785.05 and 1785.07. Therefore, I conclude that legal title to stock of a professional association may be held by a trustee of a qualified pension or profit sharing plan, licensed to render the same professional service as that for which such association was organized, as long as equitable title to the stock is also held by such licensed professionals.

Therefore, it is my opinion, and you are so advised, that the legal title to stock of a professional association may be held by a trustee of a qualified pension and profit sharing plan, licensed to render the same professional service as that for which such association was organized, as long as equitable title to the stock is also held by such professionals.

#### OPINION NO. 78-067

##### Syllabus:

The Adult Parole Authority is responsible for hospital expenses of a probationer under its supervision and control when such costs are incurred when the probationer has been arrested and detained by a county sheriff pursuant to R.C. 2951.08.

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To: Donald J. Johnson, Van Wert County Prosecutor, Van Wert, Ohio  
By: William J. Brown, Attorney General, December 20, 1978

I have before me your request for my opinion which may be summarized as follows:

A Van Wert County deputy sheriff arrested a probationer for a violation of his probation on the order of an officer of the Adult Parole Authority (APA) pursuant to R.C. 2951.08. While the probationer was being held in the county jail, he became ill and had to be taken to the hospital. Upon discovering the probationer's illness, the Adult Parole Authority withdrew its "hold" on the probationer. Is the county sheriff or the APA liable for the hospital expenses incurred?

A county sheriff is required by R.C. 2935.03 to arrest persons in violation of state statutes and municipal ordinances. However, he is not obligated to pay for the hospital costs of all such persons. 1976 Op. Att'y Gen. No. 76-012. He is only liable for costs incurred when such person was arrested for a violation of a state statute.

In the facts set forth in your letter, the probationer was detained by a deputy sheriff pursuant to R.C. 2951.08, which provides as follows:

During a period of probation, any field officer or probation officer may arrest the defendant without a warrant and bring him before the judge or magistrate before whom the cause was pending. Such arrest may also be made by any sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer upon the written order of the chief probation officer, if the defendant is under the supervision of a county department of probation, or on the warrant of the judge or magistrate, or on the order of the adult parole authority created by section 5149.02 of the Revised Code, if the defendant is under its supervision. (Emphasis added)

Based upon the facts you have provided, it must be assumed that the probationer in question was under the supervision of the APA. Otherwise, the APA officer would not have had the authority to order the sheriff to effect his arrest. See, R.C. 2951.06.

As previously noted, a county sheriff does not necessarily become responsible for the payment of hospitalization costs of a person he has arrested simply because he made the arrest. Other factors must be considered in order to determine upon whom liability for such costs must be placed. In the situation you pose, the arrest was accomplished by the sheriff in compliance with an order issued by an agent of the APA pursuant to R.C. 2951.08. The probationer was, at the time of his arrest, under the control and supervision of the APA, R.C. 2951.06. The APA, as the instrumentality of the state lodged with such responsibility over the probationer, is properly chargeable with the duty to pay hospitalization costs incurred during the detention of a probationer by a county sheriff pursuant to its order.

Accordingly, it is my opinion, and you are so advised, that the Adult Parole Authority is responsible for hospital expenses of a probationer under its supervision and control when such costs are incurred when the probationer has been arrested and detained by a county sheriff pursuant to R.C. 2951.08.