OPINION NO. 74-016

Syllabus:

A board of trustees of a state university cannot subject itself to binding arbitration in a written agreement between itself and an organization representing its unclassified civil service employees.

To: John M. Newman, Chairman, Board of Trustees, Youngstown State University, Youngstown, Ohio
By: William J. Brown, Attorney General, February 22, 1974

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

> "May the Board of Trustees of a State University subject itself to binding arbitration under conditions delineated in a written agreement between itself and an organization representing its unclassified civil service employees?"

Binding arbitration as a means of settling disputes arising out of private contracts is a procedure that has been widely accepted in our legal system. The practice of submitting a disputed matter to a third person for determination has in recent years enjoyed a remarkable and well deserved growth in the area of labor relations. Binding arbitration has, in this respect, provided an effective alternative to strikes and overloaded court dockets.

Although the process of arbitration has proved to be desirable in various contexts, it is an inappropriate method of solving labor disputes arising between public employees and instrumentalties of the state. The government of Youngstown State University is vested in the Board of Trustees of that University. R.C. 3356.03, which sets forth the powers and duties of the Board of Trustees, provides as follows:

> "The board of trustees of Youngstown state university shall employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary. The board shall do all things necessary for the creation, proper maintenance, and successful continuous operation of the university. The board may accept donations of lands and moneys for the purpose of such university."

Thus, such matters as the employment, removal and compensation of employees is placed squarely and exclusively within the provence of the Board of Trustees. Moreover, it is obvious that these powers, by their very nature, require the continuous exercise of discretion and judgment. The General Assembly has seen fit to vest such discretion in the board of trustees and the delegation of such powers is, in the absence of legislative consent, unauthorized.

It is firmly established in the jurisprudence of our system of state government that the various governmental boards have only such powers as are expressly conferred upon them by statute and those which may necessarily be implied therefrom. Davis et al. v. State, ex rel. Kennedy, 127 Ohio St. 261, 264 (1933). Authority to submit a dispute arising from a labor contract to binding arbitration is neither expressly nor impliedly conferred upon the board of trustees of a state university. To the contrary, there is every indication that the General Assembly intended the formulation of labor policy to be the exclusive province of such a board.

It is true that the Board of Trustees of Youngstown State University, is, pursuant to R.C. 3356.04, authorized to enter into all necessary contracts and agreements. However, the Board cannot contract to do something which is contrary to the law.

A situation closely analogous to the present one was considered by the Franklin County Court of Appeals in Hamilton Local Board of Education v. Mrs. Judith Arthur, No. 73AP-179 p. 2093 (1973). The court held that a board of education is without authority to enter into a contract which has within it a provision for binding arbitration. Such a provision would place in a different party the right to make binding policy decisions, which policy decisions have been placed by law within the jurisdiction of the various boards of education. The court stated at 2113 as follows:

"We believe it to be highly probable that continued discussion, close communication and cooperation between the board and the professional personnel in these regards, would greatly facilitate the proper exercise by the Board of its statutory powers in providing a public school program throughout Ohio.

"However, matters which are squarely within the province and power as granted to the school boards by the legislature, such as the power to establish teachers' salaries, may not be delegated to others for the purpose of policy or decision making."

A similar decision was reached with respect to a city transit board in the case of City of Cleveland v. Association, 30 Ohio Op. 395 (1945). The court, in holding that in the absence of any specific grant of power the Cleveland Transit Board is without authority to enter into an agreement with any union or organization of employees providing for compulsory arbitration of disputes arising over wages, hours or working conditions, quoted at 410 from the case of Mann et al. v. Richardson, 66 Ill. 481 (1873) as follows:

"Where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, and therefore such officer cannot submit such matters to arbitration."

It is significant that courts in other states have reached similar conclusions with respect to provisions calling for binding arbitration between public employees and agencies of the state. In the case of Board of Education v. Education Association, 120 N.J. Super. 564 (1972), the court held it was improper for an arbitrator to take jurisdiction over the question of whether a seventh grade teacher could conduct a debate on abortion in his classroom. The court stated at 570 as follows:

"The courts have recognized that public employees cannot make contracts with public agencies that are contrary to the dictates of the Legislature. Lullo v. International Association of Fire Fighters, 55 N.J. 409. 73 LRRM 2680 (1970). Nor can public agencies such as a board of education 'abdicate or bargain away their continuing legislative or executive obligations or discretion.' Lullo, supra, 440, 73 LRRM at 2693.

"It is concluded therefore that if the contract is read to delegate to a teacher or to a teacher's union the subject of courses of study, the contract in that respect is ultra vires and unenforceable. It must follow therefore that the American Arbitration Association cannot be the sub-delegee of the Board and of the teachers.* * *"

It is true that none of the foregoing has dealt directly with state universities. I feel, however, that the principles announced in these cases would apply equally to all instrumentalities of the state. Thus, a state university would occupy the same status as any of the state agencies mentioned in the cases.

I am aware that the General Assembly has enacted a general statute upholding the validity of all contractural provisions calling for arbitration. R.C. 2711.01, which provides that arbitration shall be a valid means of settling most controversies arising out of a contract, reads as follows:

> "A provision in any written contract, except as hereinafter provided, to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
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> "Sections 2711.01 to 2711.15, inclusive, of the Revised Code shall not apply to controversies involving the title to or the possession of real estate, with the following exceptions:
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> "(A) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;
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> "(B) Controversies involving the amount of rentals due under any lease;
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> "(C) Controversies involving the determination of the value of improvements at the termination of any lease;
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> "(D) Controversies involving the appraisal of property values in connection with making or renewing any lease:
>
> "(E) Controversies involving the boundaries of real estate."

It is true that when originally enacted R.C. 2711.01 excepted from its operation "collective or individual contracts between employers and employees in respect to terms or conditions of employment." (G.C. 12148-1) The deletion of the exception in a 1955 amendment shows a legislative intent that R.C. 2711.01 should apply to labor contracts. (126 Ohio Laws 304) However, neither the amendment nor the language of R.C. 2711.01 indicates that the Section authorizes a board of trustees to enter into a contract calling for binding arbitration with respect to matters in which the board has a statutory duty to exercise discretion.

Moreover, it is well settled that unless the state is expressly referred to therein, it is not bound by the terms of a general statute. State, ex rel. Williams v. Glander, 148 Ohio St. 188 (1947); State, ex rel. Parrott v. Board of Public Works, 36 Ohio St. 409 (1881). Applying this rule, it is apparent that R.C. 2711.01 can have no effect upon the situation at hand.

Furthermore, R.C. 2711.01 is clearly a law of general application. Conversely, R.C. 3356.03, which imposes upon the board of trustees the duty to employ, remove and determine the compensation of employees, is a specific statute expressly dealing with such university matters. This specific statute is controlling over the general provisions of R.C. 2711.01. See R.C. 1.51.

Finally, I invite your attention to Am. Sub. H.B. 86, p. 62-63, in which the General Assembly has restated its intent that all authority vested in the university boards of trustees shall, in fact, be exercised by the boards, as follows:

> "The general assembly hereby declares its expectation that the authority of government vested by law in the boards of trustees and in the boards of directors of state-assisted institutions of higher education shall in fact be exercised by said boards. Boards of trustees and boards of directors may consult extensively with appropriate student and faculty groups. Administrative decisions about the utilization of available resources, about organizational structure, about disciplinary procedure, and about administrative personnel shall be the exclusive prerogative of boards of trustees and boards of directors. Any delegation of authority by a board of trustees or by a board of directors shall be accompanied by appropriate standards of guidance concerning expected objectives in the exercise of such delegated authority and shall be accompanied by periodic review of the exercise of this delegated authority to the end that the public interest in contrast to any institutional or special interest shall be served."

I think it clear, therefore, that a state university is in no way bound by the provisions of R.C. 2711.01. To hold otherwise could result in the possibility of any governmental agency contracting away its governmental powers involving the exercise of discretion by agreeing to delegate such powers to arbitrators. R.C. 2711.01 cannot have such an effect, nor is there any indication that such was the intent of the legislature. R.C. 2711.01 applies to citizens generally, not to public officials as such.

Therefore, in specific answer to your question, it is my opinion and you are so advised that a board of trustees of a state university cannot subject itself to binding arbitration in a written agreement between itself and an organization representing its unclassified civil service employees.