OPINION NO. 74-036

Syllabus:

Pursuant to provision 4(a) of the merger agreement entered into by Cleveland State University and Fenn College on July 27, 1965, Cleveland State University was not obligated to continue providing to the former faculty and staff members of Fenn College any specific fringe benefit which could not be duplicated in kind, whether such duplication was prevented by statute or by university policy.

To: Walter B. Waetjen, Pres., Cleveland State University, Cleveland, Ohio
By: William J. Brown, Attorney General, May 3, 1974

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

> "Pursuant to the merger agreement entered into by Cleveland State University and Fenn College on July 27, 1965, is the University presently obligated to continue in kind the specific fringe benefits which the former Fenn College faculty and staff members were receiving at the time the merger agreement was executed?"

Provision 4(a) of the Agreement and Plan of Transition, which was executed by the duly authorized officers of Fenn College and Cleveland State University on July 27, 1965, concerns the compensation and fringe benefits to be provided to the personnel transferred from Fenn College to Cleveland State University. That provision reads as follows:

> "4. It is the objective of Fenn and the Trustees of CSU that from and after the Effective Date all personnel presently employed by Fenn shall, if they so desire, become employees of the Trustees of CSU and shall be encouraged to continue their contribution to the development of higher education in this community. Without limitation as to the specific methods or provisions by which the above objective is to be obtained, the following provisions are applicable:
>
> "(a) The Trustees of CSU shall, except to the extent prohibited by law, provide all personnel transferred from Fenn with the same or improved compensation arrangements, at least the equivalent in the areas of so-called fringe benefits (such as, but not limited to, retirement benefits, vacation pay, holiday pay, tuition benefits, and medical and group life insurance programs) when they cannot be duplicated in kind and, in general, the Trustees of CSU shall take appropriate action to alleviate any personal hardship that arises solely out of the transfer of personnel from Fenn to CSU."
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> (Emphasis added.)

I understand that the fringe benefit in which you are specifically interested is that of tuition benefits, which is mentioned only parenthetically in provision 4(a). Provision 4(a) is sufficiently ambiguous to permit the use of rules of construction to ascertain its meaning. When words in a contract are susceptible of more than one meaning, one must look to the intent of the parties as expressed in the contract to aid in interpreting the ambiguous words. Courtright v. Scrimger, 110 Ohio St. 547 (1924); Gibbons v. Schwind Realty Co., 25 Ohio L. Abs. 260 (1937).

The intent of the parties to the Agreement and Plan of Transition apparently was, in the contract as a whole, to provide for the merger of the institutions involved, and, in provision 4(a) specifically, to insure that the personnel of Fenn College received

an equivalent compensation and fringe benefit package at Cleveland State University. Provision 4(a) required the trustees of Cleveland State University to "provide all personnel transferred from Fenn with at least the equivalent in the areas of so-called fringe benefits when they cannot be duplicated in kind." Thus an interpretation of the phrase "when they cannot be duplicated in kind" is necessary to answer your question.

When this phrase is read in light of the intent of the parties, which was to provide an equivalent compensation and fringe benefit package for Fenn personnel, I must conclude that it includes any fringe benefit which could not be similarly duplicated, whether such duplication is prevented by statute or by university policy. If the parties had intended to require the payment of specific fringe benefits, they could have specifically provided in the agreement for such payment. However, if certain of the fringe benefits which the Fenn personnel were receiving at the time of the merger could not be duplicated in kind by Cleveland State University, the University was required by provision 4(a) to provide other fringe benefits at least equivalent in value to those which could not be provided.

When interpreting ambiguous language in a contract, the interpretation which the parties have given to such language by their subsequent acts may be considered. Courtright v. Scrimger, supra; Pavlik v. Consolidation Coal Co., 456 F. 2d 378 (1972); Grundstein v. Suburban Motor Freight, 92 Ohio App. 181 (1952). Since apparently Cleveland State University has never provided a fringe benefit of tuition reimbursement for its employees and the trustees of Fenn College have never questioned the failure to pay such a benefit, I must conclude that the parties have not interpreted provision 4(a) to require the University to provide a fringe benefit of tuition reimbursement.

I must note, however, that under provision 17 of the Agreement and Plan of Transition only the parties to the agreement and the individual trustees and members of the Fenn Corporation were vested with enforceable rights. No enforceable rights were created in the faculty and staff members of Fenn College. When a contract is made for the benefit of another, that person can have no greater rights under that contract than are provided thereby. Thull v. Equitable Life Assurance Society, 40 Ohio App. 486 (1931).

In specific answer to your question it is my opinion, and you are so advised, that pursuant to provision 4(a) of the merger agreement entered into by Cleveland State University and Fenn College on July 27, 1965, Cleveland State University was not obligated to continue providing to the former faculty and staff members of Fenn College any specific fringe benefit which could not be duplicated in kind, whether such duplication was prevented by statute or by university policy.