OPINION NO. 73-016

Syllabus:

1. A member of the board of trustees of a regional transit authority may not, at the same time, be an officer of a municipal corporation which is a member of that authority.

2. The acting manager of a private corporation which is to provide management skills and employees to operate a transit system, may be employed by the board of trustees of a regional transit authority as legal counsel or secretary, but he must not act in any situation in which there might be a conflict of interest between the corporation and the authority.

3. Other employees of a private corporation may be employed by the board of trustees of a transit authority to serve it in any other capacity, but conflicts in interest must be avoided.

4. The board of trustees of a regional transit authority may not pay the membership dues of a private corporation's officials in local service clubs.

5. The board of trustees of a regional transit authority may pay the expenses of a private corporation's officers to attend conventions of regional transit authority organizations.

6. The board of trustees of a regional transit authority may reimburse a private corporation for the cost of training programs in which it enrolls its employees.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 6, 1973

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

> 1. May a member of a Regional Transit Authority board of trustees also be an officer of a municipality served by the system when that municipality also participates in the payment of operating costs (through appropriations authorized by the legislative authority) when that person, as a trustee, will be spending funds that, as a municipal officer (Law Director, Councilman, Service Director) he was in a position to appropriate or influence the appropriation?
>
> 2. May the acting manager of the private corporation who is to provide management skills and employees to operate the transit system also be employed as legal counsel and secretary to the board of trustees of the regional transit system?
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> 3. May other employees of the private corporation be appointed by the board of trustees of the transit authority to serve it in any other of-

ficial capacity, i.e. as treasurer or assistant secretary-treasurer?

4. Can the board of trustees, as a public authority, pay non-operating expenses such as dues for membership of the private company's officials in local service clubs such as the Men's City Club or Chamber of Commerce?

5. Can the board of trustees properly pay the travel expenses of the private company's officers when these officers attend conventions of transit authority organizations?

6. Can the training programs by which the company enrolls its employees be properly reimbursed by the board of trustees?

Your first three questions concern possible conflicts of interest and incompatibility of positions. In this regard your attention is directed to several Sections in R.C. Chapter 306, which provide for a regional transit authority. R.C. 306.301, in authorizing the creation of a regional transit authority, states that:

> * * * A regional transit authority so created is a political subdivision of the state and a body corporate with all the powers of a corporation, comprised of the territory of one, or two or more counties, municipal corporations, townships, or any combination thereof. * * *

R.C. 306.34 vests all of the power and authority granted to a regional transit authority in its board of trustees. These powers and duties are set out in R.C. 306.35, which provides in pertinent part as follows:

> * * * [S]aid regional transit authority:
> (B) May make contracts in the exercise of the rights, powers, and duties conferred upon it;
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> * * * * * * * * *
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> (D) May make, adopt, amend, and repeal by-laws for the administration of its affairs and rules and regulations for the control of the administration and operation of transit facilities under its jurisdiction, and for the exercise of all of its rights of ownership therein;
>
> (E) May fix, alter, and collect fares, rates, and rentals and other charges for the use of transit facilities under its jurisdiction to be determined exclusively by it for the purpose of providing for the payment of the expenses of the regional transit authority, the acquisition, construction, improvement, extension, repair, maintenance, and operation of transit facilities under its jurisdiction, the payment of principal and interest on its obligations, and to fulfill the terms of any agreements made with the purchasers or holders of any such obligations, or with any person or political subdivision;
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> * * * * * * * * *

(G) May acquire, construct, improve, extend, repair, lease, operate, maintain, or manage transit facilities within or without its territorial boundaries, deemed necessary to accomplish the purposes of its organization and make charges for the use of transit facilities;

* * * * * * * * *

(L) May provide by agreement with any county, including the counties within its territorial boundaries, or any municipal corporation or any combination thereof for the making of necessary surveys, appraisals, and examinations preliminary to the acquisition or construction of any transit facility and the amount of the expense thereof to be paid by each such county or municipal corporation;

(M) May provide by agreement with any county, including the counties within its territorial boundaries, or any municipal corporation or any combination thereof for the acquisition, construction, improvement, extension, maintenance, or operation of any transit facility owned or to be owned and operated by it or owned or to be owned and operated by any such county or municipal corporation and the terms on which it shall be acquired, leased, constructed, maintained, or operated, and the amount of the cost and expense thereof to be paid by each such county or municipal corporation;

* * * * * * * * *

(O) May enter into and supervise franchise agreements for the operation of a transit system;

(P) May accept the assignment of and then supervise an existing franchise agreement for the operation of a transit system;

(Q) May exercise a right to purchase a transit system in accordance with the acquisition terms of an existing franchise agreement; and in connection with such purchase the regional transit authority may issue revenue bonds as provided by section 306.37 of the Revised Code or issue bonds secured by its general credit as provided in section 306.40 of the Revised Code;

* * * * * * * * *

In addition to the aforementioned powers, R.C. 306.44 states that:

The board of trustees of a regional transit authority may enter into such contracts or other arrangements with the United States government or any department thereof, with the state government of this or other states, with counties, municipalities, townships, or other governmental agencies created by or under the authority of the laws of the state or other states, with persons, with public corporations and private corporations as may be necessary or convenient for the making of surveys, investigations or reports thereon, and for the

exercise of the powers granted by sections 306.30 to 306.47, inclusive, of the Revised Code.
(Emphasis added.)

1. Your first question asks whether a trustee of a regional transit authority may also be an officer of a municipality served by the system. Specifically, you mention the positions of law director, councilman, and service director of a municipal corporation.

R.C. 306.33 sets out the following directive:

* * * * * * * * *

Each member of the board of trustees, before entering upon his official duties, shall take and subscribe to an oath or affirmation that he will honestly, faithfully, and impartially perform the duties of his office, and that he will not be interested directly or indirectly in any contract let by the regional transit authority.

* * * * * * * * *

It becomes apparent from this that the legislature intended that the trustees of a regional transit authority, in exercising the powers and duties of the authority, should avoid involvement in activities which interfere with the faithful performance of these duties.

At the same time, the named municipal officers are covered by various Code sections which restrict the activities of such officers. R.C. 731.02 discusses qualifications for members of the legislative authority of a city as follows:

Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city. A member who ceases to possess any of such qualifications, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.
(Emphasis added.)

It is clear from a reading of the above that a councilman of a municipal corporation may not also be a member of the board of trustees of a regional transit authority. While I find no statutes specifically prohibiting a law director and a public service director from holding any other public office, R.C. 733.78 does impose the following restriction on all officers of a municipal corporation:

No member of the legislative authority or of any board and no officer or commissioner of

> the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation. Any person who violates this section shall be disqualified from holding any office of trust or profit in the municipal corporation, and shall be liable to the municipal corporation for all sums of money or other things received by him, in violation of this section, and if in office he shall be dismissed therefrom. (Emphasis added.)

See also R.C. 735.09, which prohibits the director of public service and employees in his department from having any interest in a contract under his supervision.

The common law rule of incompatibility was set out in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) (1909):

> 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.

See also the language in State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341, 344 (1934), where the court held that:

> It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected. To countenance such practice, would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state. (Emphasis added.)

As I have already indicated, the board of trustees of a regional transit authority is authorized under R.C. 306.44 to enter into contracts with municipal corporations when necessary to the exercise of its powers and duties, such as those set out in R.C. 306.35 (L) and (M). It is apparent, therefore, that since R.C. 306.33 and 733.78 forbid trustees of a regional transit authority and officers of a municipal corporation to have outside interests in contracts entered into by their respective political subdivisions, the holding of one of the named municipal positions by a trustee of the transit authority could interfere with the conclusion of contract agreements between the two subdivisions. On this basis the positions of councilman, law director, and public service director must be viewed as incompatible with the position of trustee of a regional transit authority of which the municipal corporation is a member.

2. Your second question asks whether the acting manager of a private corporation, which has a contractual relationship with the regional transit authority, may also be employed as legal counsel and secretary to the board of trustees of the regional transit authority.

Since there is no statutory prohibition against holding the two named positions, it is necessary to determine whether the common law rule on incompatibility applies. That rule is set out above in my answer to your first question. The rule, as you will note from the language in the above cited cases, applies only where the positions in question are both in public employment and at least one is a public office. See my predecessor's discussion of this in Opinion No. 150, Opinions of the Attorney General for 1965. In considering a situation where one of the positions is not in public employment, he modified the reasoning of an earlier Opinion and said that:

> In Opinion No. 4021, Opinions of the Attorney General for 1932, page 150, a plumbing inspector was not permitted to engage in the plumbing business privately. While the result was correct, because there would have existed a conflict of interest between the inspector's public duty and his private financial enterprise, the opinion's supporting reasoning that these were incompatible was inaccurate. Since one position was not in public employment, the common law test was inapplicable. Therefore, I must modify this opinion as to its reasoning.

With respect to a position which was not an office but merely an employment, he held the rule on incompatibility inapplicable for the following reason:

> * * * The employee is responsible to the public officer who has the power of supervision and control in each instance. Such public officer is responsible in turn for the acts and conduct of his employees. Therefore, whether or not an employee's performance of his duties is satisfactory is a matter of concern primarily to such public officer regarding the internal administration of his own office.

In the present case, the manager of the private corporation which has contracted to provide management skills and employees to operate the system is not a public officer. His authority to manage the system is pursuant to a contract between the private corporation and the regional transit authority, and is not granted by a legislative enactment. The position is therefore not a public office. See State, ex rel. Sears v. McGonagle, 5 Ohio C.C.R. (n.s.) (1904), and State ex rel. Attorney General v. Jennings, 57 Ohio St. 415 (1898).

Likewise, the positions of secretary or legal counsel to the board of trustees are not public offices. They are filled by the board of trustees pursuant to R.C. 306.35 (S), which provides that the regional transit authority:

> May employ and fix the compensation of consulting engineers, superintendents,

> managers, and such other engineering, construction, accounting and financial experts, attorneys, and other employees and agents necessary for the accomplishment of its purposes;
>
> * * * * * * * * *.
>
> (Emphasis added.)

I must conclude then that the common law rule of incompatibility is inapplicable. In addition, there does not appear to be a conflict of interest, as discussed in Opinion No. 150, supra, provided that it is physically possible for one person to discharge the duties of all those positions. Therefore, be advised that the board of trustees may employ, as legal counsel or secretary, a person who is an acting manager of a private corporation which has contracted with the board to provide management skills and employees to operate the transit system. It should be remembered, however, that this conclusion recognizes a duty on the part of the board of trustees to guard against potential conflicts of interest in the organization. Where such situations arise, the board must exercise its authority to reassign the person in question, where possible, to other duties, or if necessary to remove him from his position.

3. Your third question may be disposed of in a similar manner, since other employees of the private corporation, just as their acting manager, are not in public employment. Therefore, the common law rule on incompatibility does not apply. Since there is no statutory provision prohibiting the secretary-treasurer, who under R.C. 306.33 serves at the pleasure of the board, or his assistant from holding a job with the corporation, such a course of action would be precluded only where the nature of a specific job would create a conflict of interest for the secretary-treasurer in the exercise of his duties as the fiscal officer of the regional transit authority. As indicated in my response to your second question, it is incumbent upon the board of trustees to exercise its powers of removal or reassignment when necessary to prevent any conflicts of interest from arising.

Your last three questions concern the propriety of certain expenditures to be made by the regional transit authority pursuant to a provision in the agreement between the authority and the private corporation for the management and operation of the transit system. That provision reads as follows:

> 6. AMRTA agrees to reimburse ATM for all expenditures made in the operation and management of the transit system and shall advance to ATM such moneys as shall be necessary to meet the periodic payrolls upon certification by ATM to AMRTA of any such amounts required.
>
> (Emphasis added.)

It is important to note that the regional transit authority in entering this agreement is contracting with the private corporation for the performance of certain functions, with which the transit authority is charged under R.C. Chapter 306. Thus under provision number 6, supra, the authority is agreeing to reimburse the private corporation for the management and operation expenses which it would have incurred had it chosen to operate the system on its own. It follows then that the expenditures for which the regional transit authority may make reimbursement are limited to

those expenditures which the authority could lawfully have made had it continued to manage the system itself.

It is well established that public moneys may only be spent for public purposes. See Auditor of Lucas County v. State, ex rel. Boyles, 75 Ohio St. 114 (1906), Miller v. Korns, 107 Ohio St. 287, 306 (1923). It has further been held that, while the methods employed to direct public money from public channels into private channels are sometimes very ingenious, this must not affect the fundamental principle involved. State, ex rel. Kohler v. Powell, 115 Ohio St. 418, 425 (1926). As to what constitutes a "public purpose", the court, in State, ex rel. McClure v. Hagerman, 155 Ohio St. 320 (1951), cited language in 37 Am. Jur., that:

> Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose. * * *

In Bazell v. City of Cincinnati, 13 Ohio St. 2d 63 (1968), the issue was whether the City of Cincinnati could erect a stadium and rent it to a private corporation for profit. The court, in holding that such action did not contravene the Constitution, concluded that if the outlay of public funds is for a valid purpose, though it entails some private gain, it can be a legitimate expenditure of public funds. See also State, ex rel. Bruestle v. Rich, 159 Ohio St. 13 (1953), Opinion No. 72-096, Opinions of the Attorney General for 1972, Opinion No. 71-080, nions of the Attorney General for 1971, and Opinion No. 71-044, Opinions of the Attorney General for 1971. The question, therefore, is whether the expenditures set out in questions 4, 5, and 6 may be sufficiently characterized as for a public purpose and, therefore, legal if made by a regional transit authority. See Opinion No. 72-119, Opinions of the Attorney General for 1972.

4. Your fourth question asks whether the transit authority may pay the membership dues of the private company's officials in local service clubs such as the Men's City Club or the Chamber of Commerce. In Opinion No. 2185, Opinions of the Attorney General for 1952, my predecessor ruled that a municipality is without power to pay membership dues to a local chamber of commerce because such payment would constitute the expenditure of public funds for other than a public purpose. He reasoned that, while the purpose of a chamber of commerce may be quite laudable in promoting the business prosperity and general welfare of the citizens of the municipality, the organization was definitely not organized for the purpose of promoting better municipal government. He added, at page 809, that many of the services which benefit the city are "services which every well managed chamber of commerce performs for its city in its own interests as well as the city's and do not in my opinion enlarge the city's power."

I concur in this rationale. In the present case the regional transit authority, a political subdivision, would be spending public moneys for the membership dues of a private corporation's officials in the chamber of commerce. While the work of that organization, as well as other public service associations, may indirectly benefit the regional transit authority, such is not its primary purpose. It should be further noted that the participation of these private officials in the organization will at best have only an incidental effect on the per-

formance of their duties under the contract. I must, therefore, conclude that the payment of membership dues of the private company's officials in service clubs such as the Men's City Club or the Chamber of Commerce would be an expenditure of public funds for a non-public purpose and therefore unlawful.

5. With respect to your fifth question, it is again necessary to consider the relationship of the proposed expenditures to the private company's duties under the contract and to the regional transit authority itself. You have asked whether the transit authority may pay the travel expenses of the private company's officials to conventions of transit authority organizations.

The primary purpose of conventions, unlike the service clubs discussed above, is to serve regional transit authorities by providing an opportunity to discuss mutual problems, and possible solutions thereto, concerning different aspects of the operation and management of transit facilities. The benefit to the regional transit authority is not incidental but direct in that officials charged with managing the system can become better able to perform their duties. I am, therefore, of the opinion that such expenditures are for a public purpose in that they do promote the efficient management and operation of the transit facilities pursuant to the contract agreement.

6. Your final question asks whether the training programs in which the company enrolls its employees may be reimbursed by the board of trustees of the regional transit authority. R.C. 306.35 (X) provides that the regional transit authority:

> Shall, if it acquires any existing transit system, assume all the employer's obligations under any existing labor contract between the employees and management of the system. The board shall, if it acquires, constructs, controls, or operates any such facilities, negotiate arrangements to protect the interests of employees affected by such acquisition, construction, control, or operation. Such arrangements shall include but are not limited to:
>
> (1) The preservation of rights, privileges and benefits under existing collective bargaining agreements or otherwise, the preservation of rights and benefits under any existing pension plans covering prior service, and continued participation in social security in addition to participation in the public employees retirement system as required in Chapter 145. of the Revised Code;
>
> (2) The continuation of collective bargaining rights;
>
> (3) The protection of individual employees against a worsening of their positions with respect to their employment;
>
> (4) Assurances of employment to employees of such transit systems and priority of reemployment of employees terminated or laid off;
>
> (5) Paid training or retraining programs;

(6) Signed written labor agreements.

Such arrangements may include provisions for the submission of labor disputes to final and binding arbitration. (Emphasis added.)

While the transit authority has contracted with a private corporation for that company to provide employees to operate the facilities, it is clear that the authority retains ultimate control of the system. This is evidenced by provisions in the contract which make wages and salaries set by the corporation subject to the approval of the authority, and which give the authority the right to inspect the books and records of the corporation at any time, and to terminate the agreement in certain situations by a majority vote of the board of trustees. Therefore, it is my opinion that R.C. 306.35 (X) applies to the present case and allows the transit authority to reimburse the corporation for training programs in which the company has enrolled its employees. In addition, since these training programs are directly related to the ability of the corporation to effectively operate the facilities, and as such would serve a public purpose, it appears clear that the authority may lawfully reimburse the corporation for the cost of the programs pursuant to provision number 6 of the contract.

It should be noted at this point that the foregoing is not to be read as holding that the employees of the private corporation are public employees as that term is used in various Sections of the Revised Code. As to this question, you are referred to a recent Opinion in which I discussed the issue. See Opinion No. 72-055, Opinions of the Attorney General for 1972.

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

1. A member of the board of trustees of a regional transit authority may not, at the same time, be an officer of a municipal corporation which is a member of that authority.

2. The acting manager of a private corporation which is to provide management skills and employees to operate a transit system, may be employed by the board of trustees of a regional transit authority as legal counsel or secretary, but he must not act in any situation in which there might be a conflict of interest between the corporation and the authority.

3. Other employees of a private corporation may be employed by the board of trustees of a transit authority to serve it in any other capacity, but conflicts in interest must be avoided.

4. The board of trustees of a regional transit authority may not pay the membership dues of a private corporation's officials in local service clubs.

5. The board of trustees of a regional transit authority may pay the expenses of a private corporation's officers to attend conventions of regional transit authority organizations.

6. The board of trustees of a regional transit authority may reimburse a private corporation for the cost of training programs in which it enrolls its employees.