OPINION NO. 81-033

Syllabus:

1. The Department of Mental Retardation and Developmental Disabilities has the authority to enter into an agreement with an employee union, which agreement permits Department employees to use time for which they are paid by the Department to investigate grievances, provide representation at grievance proceedings, consult with stewards and union representatives and take part in regular labor/management meetings, if the Department finds that such activities are necessary to the full and efficient performance of its duties.

2. A superintendent of an institution of the Department of Mental Retardation and Developmental Disabilities may enter into preliminary negotiations with an employee union; however, no contract with the union is binding without the consent of the director of the Department.

To: Rudy Magnone, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio

By: William J. Brown, Attorney General, July 6, 1981

I have before me a letter in which you request my opinion concerning the following two questions:

1. Can this Department or its developmental center superintendents either by informal agreement or by formal contract negotiations provide for and permit union representatives to conduct union business on State paid time?

2. Are union related activities at these institutions during meal or break periods and before or after working hours permissible?

In 1979 Op. Att'y Gen. No. 79-054, I discussed at considerable length the history of public sector collective bargaining in Ohio. I concluded, in the first paragraph of the syllabus of Op. No. 79-054, that "[t]he Ohio Department of Mental Health and Mental Retardation may voluntarily negotiate and contract with labor organizations representing its employees, provided that the Department does not conduct the negotiations in a manner which amounts to a delegation of executive responsibility or enter into contracts, the terms of which conflict with Ohio law." This conclusion was based on the grant to the Department of Mental Health and Mental Retardation under R.C. 5119.46 of all power and "authority necessary for the full and efficient exercise of the executive, administrative, and fiscal supervision over the state institutions." In 1980, pursuant to H.B. 900, 113th Gen. A. (1980) (eff. July 1, 1980), the Department of Mental Health and Mental Retardation was divided into two separate departments—the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities. However, the statutory language which formed the basis for my conclusion that the former Department of Mental Health and Mental Retardation had the authority to collectively bargain survived the legislative amendments. The exact language quoted above now appears in R.C. 5123.03(H) and gives to the Department of Mental Retardation and Developmental Disabilities the same powers with regard to state institutions for the mentally retarded as were previously possessed by the Department of Mental Health and Mental Retardation. The reasoning of Op. No. 79-054 is, therefore, unaffected by the division of the former Department of Mental Health and Mental Retardation. The Department of Mental Retardation and Developmental Disabilities may collectively bargain with its employees.

The questions posed by your letter are the logical successors to those discussed in Op. No. 79-054. Having concluded in that opinion that the Department may, if it so desires, enter into a collective bargaining agreement, it remains to be determined whether any restrictions on the Department's authority to bargain apply to the subjects with which you are concerned.

The Department, as a creature of statute, has only those powers which are expressly granted by the General Assembly or necessarily implied therefrom. State ex rel. A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917); State ex rel. Kahler-Ellis Co. v. Cline, 69 Ohio L. Abs. 305, 125 N.E.2d 222 (C.P. Lucas County 1954). The Department could not, therefore, bargain for a contract term which it does not have the power to carry out, nor agree to a term which violates an express statutory prohibition. Op. No. 79-054.

As you have described the situation, the employees in question will participate in activities authorized by the agreement between the Department and the union while on the job and while being paid their normal hourly wage by the state. This situation clearly involves an expenditure of state funds and, as such, is subject to all limitations which apply to the use of public funds. These limitations may take the form of either statutory or constitutional prohibitions.

Your letter states that the activities in question include, but are not limited to, the following:

1. Investigation of a union member's grievance or complaint;

2. Representation of a union member in a grievance procedure or disciplinary conference;

3. Consultation with union representatives who are not employees of this department;

4. Consultation among stewards;

5. Representation of the union at regular labor/management meetings at the employing department facility.

An analysis of the issues presented by your letter must begin with an inquiry into whether the Department has the requisite statutory authority to implement the terms listed above. There is no statute which expressly grants to the Department the power to agree to these specifications. However, when the General Assembly enacted R.C. 5123.03(H), it granted to the Department "the authority necessary for the full and efficient exercise of the executive, administrative, and fiscal supervision over the state institutions. " This section clearly enables the Department to initiate whatever administrative policies are necessary to "[m]aintain, operate, manage, and govern all state institutions for the care, treatment and training of the mentally retarded," R.C. 5123.03(A); to "[a]dminister the laws relative to persons in such institutions in an efficient, economical, and humane manner," R.C. 5123.03(F); and to carry out its other statutory duties.

I can see no reason why the Department may not conclude that an agreement containing the terms specified in your letter will serve to improve the operation and administration of the institutions under its control. There can be no doubt that it is a proper function of the department to ensure that state facilities for the mentally retarded function at an optimum level. See Ohio Const. art. VII, §1 (provides for institutions for the deaf, dumb and insane). See also State ex rel. Judson v. Coates, 11 Ohio Dec. 670, 8 Ohio N.P. 682 (1901) (a public officer owes a duty of good conduct and faithful administration of his responsibilities). It is clear that the relationship between the employees and the administrative officials of the institutions may be an important consideration in achieving this desired result, due to the fact that the level of employee morale and the employees' satisfaction with

working conditions and with management may be reflected in the quality and quantity of work performed within the institution. The Department could conclude that by dealing with employees as a cohesive unit, rather than on a case by case basis, the managers of the institutions could more easily identify potential problem areas and seek to alleviate the causes of these problems before they affect the performance of the Department's statutory functions. As I noted earlier, the General Assembly has granted to the Department broad powers concerning the administrative and fiscal management of the state institutions under its control. The Department would, pursuant to R.C. 5123.03(H), be permitted to take any action, not otherwise forbidden by statute or constitution, which would result in the more efficient operation of the institutions under its control. Such authority would, as I stated in Op. Att'y Gen. No. 70-054, encompass collective bargaining, and would also impliedly include the power to implement contract terms which would help the Department achieve its goals of efficiency and the optimum performance of its responsibilities. I conclude, therefore, that the Department does have the authority to enter into a contract containing the terms specified in your letter, if it finds that such terms will help it to carry out its statutory duties and provided that no statute or constitutional provision prevents such an exercise of authority.

Having concluded that the Department has the specific authority required to enter into such a contract, it is necessary to determine whether this authority is constrained by any statutory or constitutional restriction. There is no express statutory prohibition against the payment of regular wages by a state department to an employee involved in the kind of activities described in your letter, nor against the department agreeing to the specified contract terms. I have been unable to ascertain any possible conflict between the proposed agreement and any aspect of state statutory law. The only remaining limitation which may be applicable is that which prohibits the use of public money for anything other than a public purpose. It is a well-established principle that the expenditure of public funds is limited to those purposes which are public, rather than private, in nature. Ohio Const. art. VIII, §§4 and 6; Kohler v. Powell, 115 Ohio St. 418, 154 N.E. 340 (1926).

The ultimate question, therefore, becomes whether the Department of Mental Retardation and Developmental Disabilities may agree to the performance of the above-listed activities in light of the public purpose requirement. What constitutes a public purpose was discussed in detail in the Ohio Supreme Court's opinion in State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951). The Court stated that the concept of public purpose does not lend itself to a precise definition but, rather, "changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication. The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. Generally, a public purpose has for its objectives the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentments of all the inhabitants or residents within the [state] the sovereign powers of which are used to promote such public purposes." Id. at 91 (quoting 37 Am. Jur. 734).

Whether a public purpose exists, and whether the actions taken are designed to achieve such a purpose, are matters within the discretion of the particular administrative authority and "will not be rejected or reversed by the court unless manifestly arbitrary or unreasonable." State ex rel. Gordon v. Rhodes, 156 Ohio St. at 97, 100 N.E.2d at 233. I cannot conclude that a finding by the Department that an agreement which contains the terms listed in your letter would serve to improve the functioning of state institutions for the mentally retarded is either "arbitrary or unreasonable." Three of the five terms in question—the investigation of grievances, representation of members at grievance proceedings, and meetings between management and union officials—are activities related to carrying out the agreement between the Department and the union. It would serve no purpose to have a grievance procedure provided for in the contract between the Department

and the union if no employee could benefit from it. The meetings between union officials and Department administrators may also be important in achieving the goals which underlie the bargaining agreement, for they may enable the union and the administrators to coordinate their efforts to implement such goals. It would appear that the remaining two terms, the consultation among stewards and meetings with other union officials, could also be deemed necessary by the Department to improve the efficiency of its operations and better carry out its duties. For these reasons, I must conclude that, if the Department finds the provisions in question necessary for the full and efficient exercise of its duties, the Department does have the authority to enter into an agreement such as the one described in your request.[1]

I do feel it appropriate to directly address the argument that no public purpose exists for an expenditure of state funds in connection with union activities. This argument is based on the assumption that the payment of regular wages to employees taking part in the specified activities is intended primarily to benefit the labor organizations, due to the fact that the employees are conducting business which advances union interests while they are being paid by the state. An expenditure which was designed strictly to benefit a union would be an expenditure in aid of a private association and would, therefore, violate Ohio Const. art. VIII, §4. This argument, however fails to acknowledge the benefits which may flow to the state from the specified activities. You have characterized the activities in question as "union business"; however, the crucial question is whether these are activities which may properly constitute part of the activities of the Department for which state funds may be used—that is, whether these activities may be characterized as "state business." As was was previously discussed, the Department is authorized to enter into an agreement such as the one described in your letter only if it finds that the terms of the agreement will aid in the "full and efficient exercise" of the Department's statutory duties. If such a finding is made, unless it is manifestly arbitrary or unreasonable, it must be assumed the state will receive something of value to it through such an agreement. The fact that the union may also receive some incidental benefit from the performance of this agreement is irrelevant. Almost every contract which the state enters into in order to acquire necessary goods and services carries with it a benefit, usually monetary, for the other contracting party. If such a side benefit were prohibited, the state would be unable to contract with any individual or non-governmental association. This would obviously be an unworkable, and certainly an unintended, situation. Expenditures which benefit only a union and do not benefit the state would, clearly, be improper public expenditures. Where, however, a determination is made that the expenditure aids a department of the state in the performance of its duties, an expenditure of public funds in the manner described by your letter does serve a public purpose.

Your first question also presents an issue as to whether the director of the Department of Mental Retardation and Developmental Disabilities or the superintendent of a particular institution is the proper authority to enter into agreements such as those described in your letter. R.C. 5123.03(H) provides the grant of authority for such an agreement to the Department. The term "Department" does not include institutional superintendents. Rather, the terms "Department" and "superintendent" are used to distinguish two separate and distinct authorities. See R.C. 5123.04(A). R.C. 5123.04 provides that "[t]he director of mental retardation and developmental disabilities is the executive head

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[1]Your letter makes reference to informal agreements and formal contract negotiations. While the distinction between the two is somewhat unclear, I believe the foregoing discussion of the Department's statutory authority has shown that the Department has broad powers concerning the administration of the institutions under its control. This authority permits the Department to implement those policies it finds will aid it in the performance of its duties. This same authority also allows the Department to choose the means--formal or informal—best suited to implementing the chosen policies.

of the department. . .[and] [a]ll duties conferred on the department. . .shall be under his control." It is clear from this portion of R.C. 5123.04 that all issues relating to the administration of the Department and its institutions are under the control of the director. This conclusion is supported by R.C. 5123.09, which provides that the superintendent shall have executive authority over the institution but shall exercise such authority under the control of the director. Therefore, any final action must be approved by the director. I conclude that, while the superintendent may enter into negotiations with the union and reach a tentative agreement, no contract between the union and the Department is binding without the consent of the director.

Your second question asks whether employees may take part in the activities listed in your letter during designated break or lunch periods and before or after work. It is my understanding, based on conversations between a member of my staff and Mr. Alan Titchell of your office, that this question was of interest only if I concluded that an employee could not participate in the activities listed in your letter while on state time. Because I have stated that such activities are permissible, I find it unnecessary to address this second question.

As a final note, I wish to stress that while an agreement embodying the terms specified in your letter may be permissible, it is by no means required. It is within the discretion of the Department to decide whether such an agreement is necessary to the performance of its statutory duties. The decision to enter into such a contract is, therefore, one which can be made only by the Department based on the facts available to it at a particular time.

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

1. The Department of Mental Retardation and Developmental Disabilities has the authority to enter into an agreement with an employee union, which agreement permits Department employees to use time for which they are paid by the Department to investigate grievances, provide representation at grievance proceedings, consult with stewards and union representatives and take part in regular labor/management meetings, if the Department finds that such activities are necessary to the full and efficient performance of its duties.

2. A superintendent of an institution of the Department of Mental Retardation and Developmental Disabilities may enter into preliminary negotiations with an employee union; however, no contract with the union is binding without the consent of the director of the Department.