OPINION NO. 81-052

Syllabus:

1. The authority conferred upon a board of education to act pursuant to an agreement negotiated with its employees is circumscribed by the same statutory scheme as its authority to act by unilateral resolution; a board of education, pursuant to a collective bargaining agreement, may accomplish only that which it may otherwise accomplish.

2. The authority of a public employer, including a board of education, to compensate includes the authority to provide its employees, pursuant to a negotiated agreement or unilateral board policy, with fringe benefits which are not the subject of legislation that constricts the general authority of the public employer to compensate its employees.

3. A board of education, pursuant to its general power to compensate its teaching employees, may expend public funds to provide its teaching employees with free lunches at the school cafeteria or with cash payments for early retirement or for longevity of tenure with the employing school district.

4. A board of education may not expend public funds to provide cash payments to teaching employees for unused sick leave at the end of a school year; R.C. 124.39 and R.C. 3319.141 constrict the general authority of a board of education to provide this particular fringe benefit to its teaching employees.

5. A board of education may not provide tuition-free education for children of teaching employees who are not residents of the employing school district; R.C. 3313.64 and R.C. 3317.08 constrict the general authority of a board of education to provide this particular fringe benefit to its teaching employees.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, September 10, 1981

I have before me your request for an opinion concerning the legality of expenditures by boards of education pursuant to a collectively bargained agreement for employee benefits which are not expressly authorized by statute. Your further information confines the scope of your request to teaching personnel. Accordingly, the opinion expressed herein addresses the authority of boards of education to provide the following enumerated benefits to teaching personnel only and does not extend to any other classification of employee:

a. free lunches at the school cafeteria;

b. cash payments for unused sick leave at the end of a school year;

c. cash payments, in addition to regular salary payments, upon commitment to early retirement incentive program;

d. annual cash bonuses, in addition to regular salary, for longevity of tenure with the employing school district;

e. tuition-free education for children of teaching employees who are not residents of the employing school district.

In the event any or all of the above enumerated benefits are determined to constitute proper expenditures pursuant to a negotiated agreement, you further inquire as to the authority of boards of education to expend funds for such benefits pursuant to a unilateral board policy which is not incorporated into a collectively bargained agreement.

Although both of your questions are directed to specific benefits, each involves and requires definition of the general authority of boards of education. That is, a determination of the legality of any given expenditure may not be made without first delineating the parameters of a board's general power to compensate teaching employees through fringe benefits. Similarly, your corollary question—whether the benefits determined herein to be authorized pursuant to a negotiated agreement would likewise be authorized pursuant to the unilateral resolution of boards of education—requires a determination of the scope of a board's authority to act by negotiation, as opposed to its authority to act by resolution. Therefore, a review of the general scope of the authority of boards of education is preliminary to a consideration of your specific questions.

I

At the outset, I am, of course, mindful that boards of education have been created by statute to secure a thorough and efficient system of schools throughout the state as mandated by Ohio Const. art. VI, §§2, 3, and that their authority, as with all creatures of statute, is limited to the powers expressly granted by statute and those powers which must be implied therefrom as necessary to the exercise of the express statutory grants. See, e.g., Verberg v. Bd. of Educ., 135 Ohio St. 246, 20 N.E.2d 368 (1939). Acts by boards of education which contravene this axiomatic principle of limitation on their authority are unauthorized acts and subject to invalidation by the courts. See, e.g., Verberg v. Bd. of Educ., supra (board of education without authority to promulgate retirement rule which conflicted with civil service statute); Perkins v. Bright, 109 Ohio St. 14, 141 N.E. 689 (1923) (board of education without authority to award construction contract without following mandatory, statutory bidding requirements); State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921) (the authority of board of education to fix a salary for a specified term does not authorize board to "unfix" such salary during its term); State v. Griffith, 74 Ohio St. 80, 77 N.E. 686 (1906) (board of education had no authority to promulgate rules authorizing its clerk to receive tuition payments in contravention of statutes which vest power in county treasurer).

On the other hand, I am also mindful that boards of education are rather unique creatures of statute in that the legislature has vested in them broad, discretionary grants of authority: "[t]he board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises," R.C. 3313.20; "board of education shall have the management and control of all of the public schools. . .in its respective district," R.C. 3313.47. While defining and circumscribing these broad, discretionary grants has proved a substantial, ongoing task for the courts, as well as this office, it is well settled that the judgments of boards of education, as to matters exclusively within their statutory realm, are entitled to deference. See, e.g., Dayton Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975) (the discretionary powers of a board of education to govern, manage, and contract necessarily include the authority to collectively bargain with its employees and to agree to a binding arbitration provision); State ex rel. Ohio Athletic Ass'n v. Judges of the Court of Common Pleas, 173 Ohio St. 239, 181 N.E.2d 261 (1962) (board of education may within its discretionary authority authorize a school within its district to become a member of a voluntary association); Greco v. Roper, 145 Ohio St. 243, 61 N.E.2d 307 (1945) (board of education held to have discretion as to cause for termination of contract of teacher); Brannon v. Bd. of Educ., 99 Ohio St. 369, 124 N.E. 236 (1919) ("[a] court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine"); Bd. of Educ. v. State, 80 Ohio St. 133, 88 N.E. 412 (1909) ("so far as rules so established are reasonable, and fairly calculated to insure good government and promote the ends of education, [they] will be sustained by the courts"); Sewell v. Bd. of Educ., 29 Ohio St. 89, 91 (1876) ("[present R.C. 3313.47] leaves the whole subject of the making such rules and their enforcement to the judgment and sound discretion of the board").

Furthermore, the Ohio Supreme Court has recently held that the express grants of authority to a board of education necessarily include additional, implied authority. In Dayton Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), the Supreme Court held that, when considered collectively, the express statutory powers of a board of education to manage the schools, R.C. 3313.47, to govern its employees, R.C. 3313.20, to contract and be contracted with, R.C. 3313.17 (upon authorization at a meeting of the board, R.C. 3313.33), and the express requirement to "enter into written contracts for the employment and re-employment of all teachers," R.C. 3319.08, necessarily include the "discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees." Dayton Teachers, 41 Ohio St. 2d at 132, 323 N.E.2d at 717. Pursuant to the above discretionary authority and "finding no statutory prohibition," the court further held that the binding grievance arbitration provision was a valid and lawful exercise of the board's authority. Dayton Teachers, 41 Ohio St. 2d at 133, 323 N.E.2d at 718. See 1979 Op. Att'y Gen. No. 79-054 for an extensive discussion of the evolution of Dayton Teachers from Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947) (labor unions have no function which they may discharge in connection with civil service appointees; the civil service laws of the state cover fully all questions of wages, hours of work and conditions of employment; the duties of elected and appointed officials would be interfered with by the intrusion of the outside [labor] organizations).

It must be remembered, however, that in its finding of implied authority for negotiation and binding arbitration in Dayton Teachers, the court certainly did not grant boards of education carte blanche in the negotiating arena. The authority conferred upon boards of education to act pursuant to a negotiated agreement is, of course, circumscribed by the same statutory scheme as their authority to act by unilateral resolution. Loveland Educ. Ass'n v. Loveland Bd. of Educ., 58 Ohio St. 2d 31, 387 N.E.2d 1374 (1979); Dayton Teachers, supra. Thus, a board of education may not accomplish by collective bargaining that which it may not otherwise

accomplish.[1] Therefore, and in partial response to your second question, a board of education may expend funds, pursuant to a negotiated agreement or by resolution, if and only if there is authority for the expenditures ab initio. The fundamental question presented by your request, then, is whether the authority of a board of education to provide the fringe benefits enumerated has been expressly granted by statute or may be implied from one or more express grants.

While there is no express statutory authority for any of the benefits enumerated herein, the scope of the power to compensate has been broadly interpreted by recent Supreme Court decisions pertaining to the provision of fringe benefits in the public sector.

The term "compensation" recently received an expansive interpretation by the Supreme Court. In State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976), the court stated that "[f]ringe benefits, such as the payments made here [health insurance premiums], are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check." "Such payments for fringe benefits may not constitute 'salary,' in the strictest sense of that word, but they are compensation." 46 Ohio St. 2d at 391, 348 N.E.2d at 694. Although not expressly stated by the court in Parsons, the conclusion that the power to fix compensation includes the power to fix fringe benefits is implicit in its opinion. See, e.g., 1979 Op. Att'y Gen. No. 79-064; 1977 Op. Att'y Gen. No. 77-066; 1976 Op. Att'y Gen. No. 76-078; 1975 Op. Att'y Gen. No. 75-084; 1975 Op. Att'y Gen. No. 75-008.

The Supreme Court formally recognized the logical consequent to the Parsons compensation doctrine in Ebert v. Stark County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (per curiam): "In order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation." Ebert, 63 Ohio St. 2d at 33, 406 N.E.2d at 1100. The board of mental retardation in Ebert asserted that R.C. 124.38 both established and limited its authority to provide sick leave benefits, and, thus, required the retraction of sick leave credits granted in excess of the R.C. 124.38 formula pursuant to a prior board policy.[2] The court disagreed: "R.C. 124.38 neither establishes nor limits the power of a political subdivision. Rather, it ensures that the employees of such offices will receive at least a minimum sick leave benefit or entitlement." Ebert, 63 Ohio St. 2d at 32, 406 N.E.2d at 1099-1100. In order to determine the extent of the board's authority to provide sick leave

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[1]For example, in 1977 Op. Att'y Gen. No. 77-024, I was asked whether a board of education could, by negotiated agreement or unilateral policy resolution, authorize the clerk of the board to deduct the income tax due a foreign state under a reciprocal tax agreement. Finding no express authorization and that the provision was not fundamental or necessary to the government of employees, the management of schools, or any other express power, I concluded that the authorization to deduct foreign taxes would be tantamount to expanding the statutory duties of the clerk—a course of action which could not be embarked upon by a board of education, by negotiation or by resolution. (1961 Op. Att'y Gen. No. 2261 approved and followed.)

[2]R.C. 124.38 provides, in pertinent part, that:

> [E]ach employee in the various offices of the county, municipal, and civil service township service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 [3319.1.41] of the Revised Code, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay.

benefits in excess of the minimum statutory entitlement, the court looked to the express power of a board of mental retardation to employ, former R.C. 5126.03, now R.C. 5126.05, and concluded: "There being no provision in R.C. Chapter 5126 which would constrict the board's power to provide sick leave credits in excess of the minimum level of R.C. 124.38, this court finds that the board's adoption of its pre-1975 sick leave policy was a lawful exercise of its authority." Ebert, 63 Ohio St. 2d at 33, 406 N.E.2d at 1100.

The extensive reach of the Ebert decision is apparent upon consideration of the underlying rationale. While the express holding of the court is confined to the finding that the authority of a board of mental retardation to employ necessarily includes the authority to provide sick leave benefits in excess of the minimum statutory entitlement contained in R.C. 124.38, the rationale underlying the Ebert decision is not confined to the particular factual circumstances before the court. The court spoke in general, unlimited terms: fringe benefits are compensation; a legislative grant of power to employ necessarily includes the power to fix compensation, which includes fringe benefits. The rationale in Ebert, then, necessarily extends to any creature of statute and establishes the proposition that the power to employ includes the power to fix any fringe benefit—absent constricting statutory authority.

Under the force of the decisions of the Supreme Court in Parsons and Ebert, I readily conclude that the authority to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer's authority vis a vis a particular fringe benefit. The court's decision in Ebert provides the framework within which a question concerning the authority of a public employer to provide a fringe benefit must be analyzed. The statutory scheme covering the public employer and its employees must be reviewed in order to establish the distinct authority of the public employer to compensate.[3] Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular fringe benefit in issue by the public employer to its employees must be identified. If the particular fringe benefit is not the subject of any statutory provisions applicable to the public employer or its employees, the fringe benefit in question is a permissible exercise of the public employer's authority to compensate its employees. On the other hand, if the particular fringe benefit is the subject of any statutory provision applicable to the public employer or its employees, further consideration is required. If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit.

II

With the foregoing framework in mind, I may proceed to consider the authority of a board of education to expend funds on the employee benefits which you enumerate. I first direct my attention to the authority of a board of education

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[3]In the absence of the express authority to compensate, the authority to employ, of course, establishes the power to compensate those employed. Ebert v. Stark County Bd. of Mental Retardation, 63 Ohio St. 31, 33, 406 N.E.2d 1098, 1100 (1980).

to compensate teaching personnel, which authority is central to an affirmative determination as to each of the benefits in issue.

The authorization for boards of education to employ teachers expressly appears in R.C. 3319.07: "The board of education of each city, exempted village, and local school district shall employ the teachers of the public schools of their respective districts."

Therefore, pursuant to its express power to employ, a board of education has the general authority to compensate its teaching employees with fringe benefits which are not the subject of legislation which constricts the board's general authority. It remains to be determined whether the board's general authority is constricted as to any of the enumerated benefits by any statutory provisions which govern boards of education or their teaching personnel.

We may now proceed to identify and examine the statutory provisions applicable to a board of education or its employees which pertain to each of the fringe benefits enumerated. Under the general authority test set forth above, a board of education, pursuant to the general power of a public employer to compensate its employees, may unquestionably provide its employees with fringe benefits which are not the specific subject of existing legislation without further inquiry. A statutory provision represents a potential source of constricting authority relative to the provision of a particular fringe benefit only if it directly addresses such benefit. Several of the benefits you have enumerated are not the specific subject of existing legislation.

The general authority of a board of education to compensate its employees with fringe benefits is unfettered as to the provision of free lunches in the school cafeteria. R.C. 3313.81 is the only statutory provision applicable to a board of education or to its employees which is related to this particular fringe benefit. While R.C. 3313.81 authorizes a board of education to establish and operate a food service within its schools and specifically prescribes operating procedure, it does not address the subject of "free meals." Thus, R.C. 3313.81 is not a source of constricting authority for the fringe benefit of free meals in the school cafeteria, and a board of education may provide this particular fringe benefit to its teaching employees pursuant to its general authority to compensate.

Similarly, although the minimum salary schedule for teaching employees set forth in R.C. 3317.13 is based in part on years of service, it does not address the subject of annual bonuses based on longevity of service with the employing school district. Indeed, R.C. 3317.14 specifically authorizes a board of education to adopt a salary schedule, which may be based on service requirements which it establishes, so long as no teacher receives less than the amount required to be paid pursuant to R.C. 3317.13. Since R.C. 3317.13 does not preclude a board of education from increasing the salary level of teaching employees based on years of employment in its district, it does not preclude a board of education from providing an annual cash bonus based on years of employment in its district. Thus, it is not a source of authority which constricts the general authority of a board of education to provide the fringe benefit in question.

The question of cash payments to early retirees in addition to regular salary payments also prompts an analysis of R.C. 3317.13-.14 for constricting effect. As confirmed by your additional information, this fringe benefit would be available in addition to regular salary to those teaching employees who commit themselves to an early retirement date in the manner and subject to the requirements set forth by the employing board. Since early retirement bonuses are not the subject of R.C. 3317.13-.14 or any other statute governing boards of education and their teaching employees, such benefits are authorized by the general authority of a board of education to compensate, provided that each teaching employee receives the minimum salary required by R.C. 3317.13, apart from the receipt of cash payments pursuant to a retirement incentive program.

The determination of the authority of a board of education to expend funds in the form of cash payments for sick leave at the end of a school year requires the examination of the statutory provisions relative to teachers' sick leave benefits in order to determine if such statutes constrict the board's authority to compensate in this manner.

R.C. 3319.141 governs sick leave for "[e]ach person employed by any board of education in this state." Under the authority of Ebert, I find that R.C. 3319.141, like R.C. 124.38, ensures a minimum sick leave entitlement (of fifteen days sick leave with pay, for each year under contract), and neither establishes nor limits the authority of the board of education to provide a greater sick leave benefit. As to the accumulation of sick leave, R.C. 3319.141 mandates that "[u]nused sick leave shall be cumulative up to one hundred twenty days, unless more than one hundred twenty days are approved by the employing board of education" (emphasis added). The statute is silent as to the conversion of accumulated, unused sick leave to cash payments.

R.C. 124.39 is the only statutory provision applicable to employees of a board of education which addresses the conversion of unused sick leave benefits into cash payments. R.C. 124.39(B) enables an employee of a political subdivision covered by R.C. 3319.141 (that is, a board of education), with ten or more years service at the time of retirement from active service, to be paid in cash for one-fourth the value of his accrued, but unused, sick leave credit. An employee may receive more than one payment under R.C. 124.39(B), but payment under that provision eliminates all sick leave credit accrued at the time of the payment, and the value of all payments shall not exceed the value of thirty days of sick leave.

R.C. 124.39(C) authorizes a political subdivision[4] to which R.C. 124.39(B) applies to adopt a policy other than R.C. 124.39(B), specifically delineating permissible deviations:

> 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.[5]

R.C. 124.39(C) is representative of the gender of constricting authority of which the court spoke in Ebert, supra, in that it defines the parameters of the policy which may be adopted in lieu of that set forth in R.C. 124.39(B); it limits to its terms the authority of a political subdivision to adopt a policy for the conversion of sick leave to cash payments. Clearly, in order to accord R.C. 124.39 the presumption of effectiveness mandated by R.C. 1.47, and, indeed, any meaning whatsoever, R.C. 124.39(C) must be read as constricting the general authority of a political subdivision to compensate its employees with the fringe benefit of cash payments for unused sick leave. See 1981 Op. Att'y Gen. No. 81-015 at 2-58 ("county commissioners. . .may promulgate a policy for payment for accumlated sick leave upon retirement of county board of elections employees, provided such policy is within the limits established by R.C. 124.39").

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[4]See 1981 Op. Att'y Gen. No. 81-015 ("Only the political subdivisions named in R.C. 124.39(B) are authorized to act pursuant to R.C. 124.39(C)").

[5]A board of education is a political subdivision responsible for promulgating the policy authorized by R.C. 124.39(C). 1978 Op. Att'y Gen. No. 78-057.

The adoption of a policy permitting an employee to receive payment for unused sick leave at the end of each year of employment is not among the permissible deviations set forth in R.C. 124.39(C). The statute authorizes a policy "permitting an employee to receive payment upon a termination of employment other than retirement" (emphasis added)—not upon the termination of any given year of employment. Although "[t]he board of education. . .shall enter into written contracts for the employment and re-employment of all teachers," R.C. 3319.08, the expiration of a teaching contract at the end of a school year certainly does not necessarily constitute the termination of employment. Indeed, R.C. 3319.11 provides that a teacher, whether under a continuing contract (in effect until teacher resigns, retires, is terminated or suspended, R.C. 3319.08) or a limited contract (term not to exceed five years, R.C. 3319.08), is deemed reemployed for a subsequent school year unless notice to the contrary is provided by the teacher or the board of education. See also State ex rel. Peake v. Bd. of Educ., 44 Ohio St. 2d 119, 339 N.E.2d 249 (1975) (teacher under a limited contract shall automatically be deemed reemployed for the ensuing school year, absent his timely receipt of notice of the intention of the board of education not to reemploy him). On the other hand, notice by a teacher or a board of education defeating automatic reemployment under R.C. 3319.11 or the termination of an existing contract by a teacher or board of education under R.C. 3319.15-.16 would in fact terminate a teacher's employment with the board of education. See, e.g., Justus v. Brown, 42 Ohio St. 2d 53, 325 N.E.2d 884 (1975) (employment of teacher terminated by notice of intention of board of education not to rehire); cf. 1966 Op. Att'y Gen. No. 66-150 (employment of principal under continuing contract terminated upon acceptance of resignation by board of education). Clearly, the end of a school year does not in itself mark the termination of a teacher's employment as required by R.C. 124.39(C). Thus, a policy providing for payment of unused sick leave at the close of the year is not within the deviations from R.C. 124.39(B) permitted by R.C. 124.39(C). Furthermore, a construction of R.C. 124.39(C) permitting an employee to receive payment for unused sick leave at the end of each school year would conflict with the express mandate in R.C. 3319.141, set forth in pertinent part above, that "[u]nused sick leave shall be cumulative."

Therefore, although I do not question that a policy permitting the conversion of sick leave to cash payments at the end of a school year is a compensatory fringe benefit, or that the threshhold authority of a board of education to provide such fringe benefit may be implied from the express authority to employ and compensate, R.C. 3319.07-08, I must conclude that a board of education is without authority to provide this benefit, as its general authority herein is constricted by the legislative enactments of R.C. 124.39(C) and R.C. 3319.141.

The authority of a board of education to provide tuition-free education to children of non-resident teaching employees remains to be considered. Since tuition-free education is the subject of existing legislation, recently amended by Am. S.B. 140, 114th Gen. A. (1981) (eff. July 1, 1981), the relevant statutes must be examined for their constricting effect on the general authority of a board of education to provide fringe benefits to its employees.

R.C. 3313.48 provides that "[t]he board of education of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction. . . ." (Emphasis added.) The pertinent inquiry here is, of course, whether a board of education may provide free education for children who reside with their parents outside of its school district.

R.C. 3313.64 sets forth classifications of students which a board of education shall admit to its schools. In pertinent part, R.C. 3313.64 provides:

> (B) A child who is at least five but under twenty-two years of age shall be admitted to school as provided in this division. . . .
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> (1) A child shall be admitted to the schools of the school district in which his parent resides.

Clearly, then, under R.C. 3313.64, the children of the teaching employees of a board of education who reside outside of the employing school district shall be admitted to the schools of the district in which their parents reside. In addition, R.C. 3321.03 imposes a coordinate obligation on parents:

> Except as provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school under division (B) of section 3313.64 of the Revised Code, to participate in a special education program under Chapter 3323. of the Revised Code, or to otherwise cause him to be instructed in accordance with law. (Emphasis added.)

The admittance of a child to a school other than that specified by R.C. 3313.64 is expressly conditioned on the payment of tuition. "A board of education may admit to its schools a child it is not required by section 3313.64 of the Revised Code to admit, if tuition is paid for the child." (Emphasis added.) R.C. 3317.08.

Finally, the circumstance of non-resident teaching personnel is not among those sanctioned for waiver of tuition by a board of education. R.C. 3313.64(E) (board of education may admit a child free of tuition for sixty days on the sworn statement of an adult resident that he has initiated legal proceedings for the custody of the child); R.C. 3313.64(G) (board of education may waive tuition for foreign exchange student who will temporarily reside in the district).

The above provisions certainly appear to limit free education to children of school district residents, as defined in the relevant statutes, thereby constricting the general authority of the board to provide the fringe benefit of tuition-free education. However, the opinions of my predecessors on this matter merit consideration.

1951 Op. Att'y Gen. No. 552, p. 292 concluded that a board of education may allow a non-resident pupil to attend school, notwithstanding the failure of the board of education to collect the tuition required by law; however, it also concluded that the attendance of a non-resident pupil without the payment of tuition constitutes unauthorized attendance and such pupil may not be counted for the purpose of the distribution of the school foundation fund. The statutory foundation for the conclusions advanced in 1951 Op. No. 552 remains part of the present statutory scheme. R.C. 3327.06(C); R.C. 3317.03(F).[6]

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[6] R.C. 3327.06(C) provides:

> If a board admits to the schools of its districts any nonresident pupil for whose attendance tuition is not an obligation of the board of another district of this state or of a home as defined in section 3313.64 of the Revised Code and fails to collect tuition as required by division (B) of this section from the pupil's parents or guardian, the attendance of such pupil is unauthorized attendance.

R.C. 3317.03(F) provides, in pertinent part:

> When a school district provides instruction for a nonresident pupil whose attendance is unauthorized attendance as defined in section 3327.06 of the Revised Code, that pupil's membership shall not be included in that district's membership figure used in the calculation of approved classroom units as provided by section 3317.05 of the Revised Code or in the calculation of that district's average daily membership under this section.

1962 Op. Att'y Gen. No. 2766, p. 43 concluded that a board of education is without authority, by rule or otherwise, to waive the payment of tuition by any students in the schools of the district where, under former R.C. 3313.64, now R.C. 3317.08, such students may be admitted to the schools only upon the payment of tuition.

Although 1951 Op. No. 552 gives a board of education some latitude in the matter of the collection of the tuition due for the out-of-district pupil, it certainly does not endorse a policy in which a board of education waives the requirement of the payment of tuition by students who are not entitled to attend a particular school pursuant to R.C. 3313.64; it simply accords a board of education the discretionary authority to allow a student to attend for a subsequent semester, recognizing that a board of education has a right of action against the parent or guardian of such pupil for the collection of the tuition due.

Neither the present statutory scheme nor the opinions of my predecessors provide any basis on which to conclude that a board of education is authorized to absolutely waive the tuition due by law; and an agreement to provide tuition-free education to children of out-of-district residents indeed requires a waiver of the tuition due. Thus, it must be concluded that the general authority of a board of education to provide fringe benefits is constricted by R.C. 3313.64 and R.C. 3317.08 relative to the provision of tuition-free education for the children of non-resident teaching personnel.

Therefore, it is my opinion, and you are advised of the following answer to your questions:

1. The authority conferred upon a board of education to act pursuant to an agreement negotiated with its employees is circumscribed by the same statutory scheme as its authority to act by unilateral resolution; a board of education, pursuant to a collective bargaining agreement, may accomplish only that which it may otherwise accomplish.

2. The authority of a public employer, including a board of education, to compensate includes the authority to provide its employees, pursuant to a negotiated agreement or unilateral board policy, with fringe benefits which are not the subject of legislation that constricts the general authority of the public employer to compensate its employees.

3. A board of education, pursuant to its general power to compensate its teaching employees, may expend public funds to provide its teaching employees with free lunches at the school cafeteria or with cash payments for early retirement or for longevity of tenure with the employing school district.

4. A board of education may not expend public funds to provide cash payments to teaching employees for unused sick leave at the end of a school year; R.C. 124.39 and R.C. 3319.141 constrict the general authority of a board of education to provide this particular fringe benefit to its teaching employees.

5. A board of education may not provide tuition-free education for children of teaching employees who are not residents of the employing school district; R.C. 3313.64 and R.C. 3317.08 constrict the general authority of a board of education to provide this particular fringe benefit to its teaching employees.