April 2, 2001

OPINION NO. 2001-015

G. Michael Payton, Acting Executive Director
Ohio Civil Rights Commission
1111 E. Broad Street, Suite 301
Columbus, Ohio 43205-1379

Dear Acting Executive Director Payton:

Your predecessor requested an opinion concerning the compatibility of two public positions. Specifically, your predecessor asked whether a member of the Ohio Civil Rights Commission (Commission) may also be employed as a part-time special assistant to the assistant vice president of training and organization development at The Ohio State University (special assistant).

The seven questions for determining whether two public positions are compatible are as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?

2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?

3. Is one position subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a conflict of interest between the two positions?

6. Are there local charter provisions, resolutions, or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167.

The sixth and seventh questions focus on the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions, resolutions, ordinances, or state or federal regulations in this instance. Whether there is an applicable local departmental regulation is a matter for officials at the Commission and The Ohio State University to determine. We will assume, for purposes of this opinion, that there is no regulation of the Commission or The Ohio State University that prohibits a person from serving simultaneously as a member of the Commission and special assistant.

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits, *inter alia*, a person in the classified service of the state from participating in partisan politics other than to vote or freely express his political beliefs. Members of the Commission are appointed by the Governor of Ohio, and thus are in the unclassified service of the state. R.C. 124.11(A)(3). *See generally* R.C. 4112.03 (members of the Commission are "appointed by the governor, with the advice and consent of the senate"). Information provided in conjunction with your predecessor's request states that the position of special assistant is in the unclassified service of the state. *See* R.C. 124.11(A)(7)(a) (the unclassified service of the state shall consist of "[a]ll presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of the public school system, colleges, and universities"); 1965 Op. Att'y Gen. No. 65-79 (syllabus, paragraph three) ("[e]mployees who work at institutions of higher education of the State of Ohio who are not specifically designated in Section 143.08(A)(7) [now R.C. 124.11(A)(7)] as comprising the unclassified service, are included in the classified civil service"). Because neither position is in the classified service of the state, the prohibition of R.C. 124.57 does not apply.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. No statute prohibits a person from serving simultaneously as a member of the Commission and special assistant. The second question thus may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. Members of the Commission are appointed and removed by the Governor of Ohio. R.C. 4112.03. The special assistant is employed by and serves at the pleasure of the officials at The Ohio State University. *See generally* 1991 Op. Att'y Gen. No. 91-011 at 2-58 ("individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause"). It thus appears that the positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, the positions are not subordinate to, or in any way a check upon, each other.

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested persons because they may more precisely determine the time demands of each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position. *See generally* 1959 Op. Att'y Gen. No. 853, p. 555, at 556 ("there does not appear to be any reason why it should be physically impossible for one person to discharge the duties of [member of a city planning commission and member of the Ohio Civil Rights Commission], neither office being a full-time job").

The fifth question asks whether there is a conflict of interest between the two positions. It is well settled that a person may not hold two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective offices or agencies he serves. 2000 Op. Att'y Gen. No. 2000-025 at 2-168. Resolution of this question requires an examination of the powers, duties, and responsibilities of the respective positions.

The Ohio Civil Rights Commission was created pursuant to R.C. 4112.03 to prevent persons from engaging in unlawful discriminatory practices.[1] R.C. 4112.05(A). The Commission is required to formulate policies to prevent unlawful discriminatory practices, receive, investigate, and pass upon written charges of unlawful discriminatory practices, make periodic surveys of the existence and effect of discrimination, prepare a comprehensive educational program that is designed to eliminate prejudices, and receive progress reports regarding affirmative action programs and affirmative housing accommodations programs. R.C. 4112.04; R.C. 4112.05. The Commission is also empowered to initiate and undertake on its own motion investigations of problems of employment or housing accommodations discrimination, hold hearings to prevent persons from engaging in unlawful discriminatory practices, study the problems of discrimination, and foster through community effort, or otherwise, good will among the groups and elements of the population of the state. R.C. 4112.04; R.C. 4112.05.

According to the position description provided with the opinion request, the special assistant serves as the departmental affirmative action officer and diversity liaison for The Ohio State University's Department of Housing, Food Services, and Event Centers. In this capacity, the special assistant directs the department's standing diversity committee, develops affirmative action plans, coordinates responses to discrimination complaints, provides assistance and support to minority student and staff organizations, assists with development and implementation of

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[1] For purposes of R.C. Chapter 4112, "[u]nlawful discriminatory practice" is defined as "any act prohibited by [R.C. 4112.02-.022]." R.C. 4112.01(A)(8). *See generally* R.C. 4112.02 (unlawful discriminatory practices); R.C. 4112.021 (unlawful discriminatory practice of creditor); R.C. 4112.022 (discrimination against persons with a disability by educational institution).

training and sensitivity programs on diversity issues, and represents the department in community outreach programs.

A review of the powers, duties, and responsibilities of the respective positions discloses that there may be instances in which a person who serves as a member of the Commission and special assistant to the assistant vice president of training and organization development at The Ohio State University could be subject to a conflict of interest. As stated above, the Commission is responsible for preventing persons from engaging in unlawful discriminatory practices.[2] In order to discharge this responsibility, the Commission may determine that it is necessary to investigate charges filed with the Commission alleging that a person has engaged or is engaging in an unlawful discriminatory practice. R.C. 4112.04(A)(6); R.C. 4112.05(B)(2). The Commission may also initiate and undertake, upon its own motion, investigations relating to unlawful discriminatory practices. R.C. 4112.04(B)(2); R.C. 4112.05(B)(2). In addition, the Commission may initiate a complaint alleging that a person has engaged or is engaging in an unlawful discriminatory practice, R.C. 4112.05(B)(3), and hold hearings to determine whether a person has engaged or is engaging in an unlawful discriminatory practice, R.C. 4112.04(B)(3); R.C. 4112.05(B)(5). *See also* R.C. 4112.04(A)(6) (the Commission is required to "[r]eceive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices").

Thus, a member of the Commission who also is employed by The Ohio State University as a special assistant in the capacity described previously may be required to discuss, or to deliberate, negotiate, or vote upon, whether to investigate the university, whether to initiate a complaint against the university, or whether the university has engaged or is engaging in an unlawful discriminatory practice. *See generally* R.C. 4112.01(A)(1) (as used in R.C. Chapter 4112, the term "[p]erson" includes "the state and all … authorities, agencies, boards, and commissions of the state"). In such situations, it would be difficult for the Commission member to set aside his loyalty to the state university that employs him. Such a predisposition of loyalty could prevent the Commission member from making completely objective decisions. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-274. Further, the Commission member may be unable to perform his duties with respect to matters concerning the state university in a completely objective manner for fear of reprisals by the officials of the state university. *See id.* at 2-277.

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[2] For purposes of R.C. Chapter 4112, the term "[p]erson" is defined as follows:

> "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

R.C. 4112.01(A)(1).

In addition, there may be situations in which a member of the Commission may have to discuss, or to deliberate, negotiate, or vote upon, whether to institute or maintain a civil action against the state university that employs him as a special assistant. In this regard, the Commission may seek temporary or permanent injunctions or temporary restraining orders from the courts of common pleas of counties in which unlawful discriminatory practices occur, R.C. 4112.05(B)(3), or may commence civil actions in the courts of common pleas to protect a person's fair housing rights under R.C. 4112.02(H); R.C. 4112.052. *See also* 1970 Op. Att'y Gen. No. 70-108. The Commission may also initiate civil actions in the courts of common pleas to enforce its final orders, R.C. 4112.06, and may appeal to the courts of appeals adverse judgments rendered by the courts of common pleas, R.C. 4112.061. Further, the Commission may institute a civil action against a state university that fails to file an affirmative action progress report required by R.C. 4112.04(A)(10), or that willfully files a false entry or statement in a progress report. R.C. 4112.11; R.C. 4112.99; 10 Ohio Admin. Code 4112-7-01; *see also* 1970 Op. Att'y Gen. No. 70-108.

In such situations, a potential conflict of interest exists because a member of the Commission who also is employed by a state university as a special assistant in the capacity described previously is exposed to the temptation of acting other than in the best interest of the Commission when participating in deliberations, discussions, negotiations, or votes relating to civil actions against the state university. And again, the Commission member may be influenced not to perform his duties with respect to matters involving the state university that employs him as a special assistant in a completely objective manner for fear of reprisals by the officials of the state university. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-277.

Although a person who serves simultaneously in two public positions is subject to potential conflicts of interest, the person may serve in both positions if the potential conflicts are not definite and immediate.[3] 2000 Op. Att'y Gen. No. 2000-025 at 2-170. The criteria for determining whether a potential conflict of interest is definite and immediate includes the probability of the conflict, the ability of the person to remove himself from the potential conflict, whether the person exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the conflict relates to financial or budgetary matters. *Id*.

With respect to your predecessor's specific inquiry, it is speculative whether this person, as a member of the Commission, will be required to participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against,

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[3] Pursuant to R.C. 102.08(A), the Ohio Ethics Commission is authorized to render opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of R.C. 102.08(A), we believe that it is proper for the Attorney General to refrain from interpreting such provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). It is, therefore, recommended that you contact the Ohio Ethics Commission for advice concerning the application of these provisions in this situation.

The Ohio State University. Such deliberations, discussions, negotiations, or votes are also not likely to occur often. The probability of the conflict of interest thus is remote and speculative. Further, even if such matters were presented to the Commission, the person, as a member of the Commission, would be able to remove himself from any such deliberations, discussions, negotiations, or votes on such matters since the Commission is capable of discharging its duties when one of its members abstains from a matter. *See generally* R.C. 4112.03 ("[t]hree members of the commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission");[4] *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur").

We are informed that investigations and cases concerning The Ohio State University are brought before the Commission infrequently. Thus, the potential conflict of interest constitutes only a small fraction of the duties of a Commission member and special assistant. The potential conflict also does not relate to financial or budgetary matters or involve decision-making authority by the person, as a special assistant.

However, the potential conflict of interest does involve the decision-making authority of the members of the Commission. This fact is not sufficient in and of itself to result in a finding of incompatibility. As explained previously, this person, as a member of the Commission, would be able to remove himself from any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, The Ohio State University. Moreover, since a public official has a duty to abstain from participating in any matter that would impair his objectivity, 2000 Op. Att'y Gen. No. 2000-025 at 2-170; *see* note three, *supra*, the Commission member is required to abstain from any such deliberations, discussions, negotiations, or votes. Accordingly, the potential for a conflict of interest does not prohibit a person from serving simultaneously as a member of the Commission and special assistant, provided that as a Commission member he does not participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, The Ohio State University.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a member of the Ohio Civil Rights Commission and part-time special assistant to the assistant vice president of training and organization development at The Ohio State University, provided that as a Commission member he does not participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, The Ohio State University.

Respectfully,

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[4] The Ohio Civil Rights Commission consists of five members. R.C. 4112.03.

BETTY D. MONTGOMERY
Attorney General

April 2, 2001

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SYLLABUS: 2001-015

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