

OPINION NO. 73-020

Syllabus:

The board of trustees of a state university need not require that a professor or other employee take vacation leave for the time he is absent from his regular duties because of professional speaking or consulting engagements elsewhere for which an honorarium is received, provided the board determines that such engagement is in the best interests of the university and will not hinder the proper performance of the contractual duties assigned to the professor or other employee.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 9, 1973

I have before me your request for my opinion, which reads as follows:

Our university examiners have raised questions involving "double pay" situations that have been found in the course of auditing several state universities.

These problems arise from instances in which the employment contracts of certain university employees allow professors and other personnel to teach or work at their specialty at other institutions or for special groups during periods when they would normally be working for the state university. Some of these contracts and often custom or personnel practice allow the personnel as much as twenty per cent of the regularly compensated time to be spent away from the university on activities that "enhance the prestige of the university, professor, or both." There arises a conflict with several statutes indicating that a state employee (one paid in whole or in part by the state) must work certain hours.

Thus, the "double pay" situation is such that an honorarium or other remuneration is received from another state institution for technical, administrative, or educational, speaking, advise, etc., when the particular individual also receives salary for the same time from the state institution of full time employment.

Thus, answers to the following questions would be greatly appreciated:

(1) Can the State Auditor's office require certification that vacation leave was taken when a professor or other employee leaves his full time employment for any time to speak or render some service for which an honorarium or some remuneration is received under the authority to prescribe a uniform system of accounting?

(2) Can a professor or other university employee receive salary for the time he was absent from university duties because of a speaking or consulting engagement at another public institution for which an honorarium or other remuneration was received?

(3) Can the individual be compensated by the state institution when the honorarium or other compensation is paid by a private educational institution?

(4) Must vacation leave be taken from the full time public institution in order for the university employee to avoid a "double pay" situation in questions (2) and (3)?

The statutes which you apparently have in mind are R.C. 143.11 and 117.05, which read in part as follows:

R.C. 143.11

Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state. When any employee is required by an authorized administrative authority to work more than forty hours in any calendar week, he shall be compensated for such time worked, except as otherwise provided in this section, at one and one-half times his regular rate of pay, or at the rate of six dollars and sixty cents per hour, whichever is the lesser.

R.C. 117.05

The chief inspector and supervisor of public offices shall prescribe and require the installation of a system of accounting and reporting for the public offices named in section 117.01 of the Revised Code. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers, and documents required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public.

I do not think that these general statutes are controlling in view of other specific statutes applicable to state universities. See Opinion No. 72-029, Opinions of the Attorney General for 1972. The receipts of a university are to be held and administered, generally, by the board of trustees, subject to inspection by your office. R.C. 3345.03 and 3345.05. However, the legislature has vested the government of the state universities in the boards of trustees. See, for example, R.C. 3335.02, 3344.01, 3341.02, 3343.02, and 3339.01. The trustees also have power to fix the compensation of their professors and other employees. See, for example, R.C. 3335.09, 3341.04, 3343.06, and 3344.03. The governing powers of trustees have been held to be quite broad. See West v. Miami University Trustees, 41 Ohio App. 367 (1931), and Long v. Board of Trustees, 24 Ohio App. 261 (1926), in which the court states at pages 263-264 as follows:

The Ohio State University is by statute made a body corporate, and very broad general powers have been conferred upon it in respect to the adoption of by-laws, rules, and regulations for the government of the University, and no express limitation is found as to the general scope of the powers and duties of the trustees as to the business to be carried on by the University.

In Opinion No. 71-051, Opinions of the Attorney General for 1971, I stated that "unless prohibited by statute, the board of trustees of a state university has broad powers to carry on the university." And I think that what I had to say recently of the authority of boards of education applies with equal force here (Opinion No. 71-026, Opinions of the Attorney General for 1971):

The Supreme Court has held that the authority conferred upon a board of education to adopt rules and regulations to carry out its statutory functions vests in the board a wide discretion, Greco v. Roper, 145 Ohio St. 243, 249 (1945); provided, of course, that specific statutory limitations on the board's authority are not exceeded, Verberg v. Board of Education, 135 Ohio St. 246 (1939). "The school laws must be liberally construed in order to carry out their evident policies and conserve the interests of the school youth of the state, and any doubt must be resolved in favor of the construction that will provide a practical method for keeping the schools open and in operation." 48 O. Jur. 2d 677; Rutherford v. Board of Education, 127 Ohio St. 81, 83 (1933).

See also Opinion No. 71-068, Opinions of the Attorney General for 1971.

I can find no prohibition of the questioned practice in any statute. R.C. 143.11 cannot be applied to require a university professor to work a 40-hour week between the hours of 8:00 A.M. and 5:00 P.M., Monday through Friday. In the first place, university boards of trustees are given a certain amount of autonomy, with respect to personnel management, by R.C. 143.09 (M), and university professors are not among those whose salaries are fixed by R.C. 143.09 and 143.10. Secondly, the nature of the profession demands irregular hours, which usually add up to more than 40 per week. A "full-time" university professor is designated by the number of classroom hours taught in a given term, not by the total number of hours he is expected to work during that part of the week considered by other persons as normal working hours. Therefore, the fact that a professor is absent from his office and classroom for one day does not automatically require him to take 8 hours vacation leave, or to forego part of his regular compensation. The decision in this matter rests with the board of trustees of the university, whose broad powers allow them wide latitude in governing the university. It could hardly be questioned that this practice is reasonably incidental to the main purpose of the university, and therefore a court would not interfere with the board of trustees' discretion in permitting it. Cf. Opinion No. 71-051, supra.

The practice of allowing, and even encouraging, professors to engage in seminars, give lectures, etc., outside their normal teaching assignments, is one of long standing. If an honorarium, or token payment, is involved, the professor has been allowed to accept it without giving up any of his regular compensation. This practice is intended to enhance the university's scholastic reputation, and may also enable it to attract the services of highly skilled professionals who would otherwise be unavailable. Under a common law rule of statutory construction, now enacted in R.C. 1.49 (F), administrative construction of a statute may be considered. Therefore, the statutes involved should be construed, if capable of more than one construction, to conform with the long-standing administrative decision to allow this practice.

Under R.C. 117.05, your office is empowered to prescribe a system of accounting which is "uniform in its application to

offices of the same grade and accounts of the same class, * * *." I can see no indication that the legislature intended, by this language, to require that positions of different natures be subjected to exactly the same requirements as to working hours. Such a construction would, in this case, override the discretion of state university boards of trustees, and thus thwart the intention of the legislature.

In summary, the practice in question appears to be legal, in view of the broad powers of state university boards of trustees, the long-standing administrative construction of the statutes, and the benefits of the practice to the universities. However, I should caution that the legislature has recently expressed its intention that the actual instruction of students not be neglected. Amended Substitute House Bill No. 475 (the Appropriations Act for 1971-1973), at page 193, reads in part as follows:

In providing this appropriation in support of instructional services at state-assisted institutions of higher education, it is the intent of the general assembly that faculty members shall devote a proper and judicious part of their work-week to the actual instruction of students. In particular, it is expected that faculty members employed on a full-time instructional contract will be engaged in instructional activity which will produce the total credit hours of classroom instruction meeting the standards of the Ohio Board of Regents as set forth in the instructional budgets for 1971-1973 submitted to the general assembly.

Hence, the board of trustees of a state university should take care that the teaching duties of professors not be neglected in favor of other scholarly pursuits, of whatever nature.

I believe the foregoing discussion answers all of your questions at least with respect to professors. Your request provides little information about the "other employees", on which to base an opinion. However, since such employees are apparently being invited to other institutions to speak or consult, they must be persons of recognized expertise in their fields. Some may be administrators recruited from the faculty, who are sought as experts either in their academic specialty or in administration. I can see no reason why the foregoing discussion and conclusion should not apply to such employees. The broad powers of boards of trustees to govern a university extend to administrative personnel, who act as agents of the board in governing the university, as well as to the faculty.

We are here concerned only with activities undertaken by a member of the university staff on time which is committed to the university by contract. Activities undertaken on the staff member's own time are, of course, his private concern, provided they do not operate to the detriment of his functions in the university.

In specific answer to your question it is my opinion, and you are so advised, that the board of trustees of a state university need not require that a professor or other employee take

vacation leave for the time he is absent from his regular duties because of professional speaking or consulting engagements elsewhere for which an honorarium is received, provided the board determines that such engagement is in the best interests of the and will not hinder the proper performance of the contractual duties assigned to the professor or other employee.