OPINION NO. 73-097

Syllabus:

A member of a board of health may not, at the same time, be employed by the board as a part-time physician.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, September 26, 1973

Your request for my opinion reads in part as follows:

> The Board of Health of the General Health District has apparently experienced difficulty in recruiting physicians to accept work in its venereal disease program. Consequently, the Board wishes to retain a physician, who is a member of the Board, to assist on a part-time basis in the operation of its Venereal Disease Clinic.
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> Ohio Revised Code Section 3709.16 reads, in part, "No member of the board shall be appointed as health officer or ward physician." In view of an uncertainty whether a physician-member employed on a part-time basis comes within the categories of health officer or ward physician for purposes of Section 3709.16 we seek your opinion on the following question:
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> Is the board of health of a general health district prohibited by Ohio Revised Code Section 3709.16 from retaining a physician, who is a member of the board, to serve on a part-time basis in a clinic operated by the board?

I fully appreciate the importance of your request. In 1919, the General Assembly, recognizing the necessity for State action to protect the public health, enacted the Hughes and Griswold Acts which created the Department of Health, and the city and general health districts, as agencies of the State. The Supreme Court has commented frequently on the effect of this legislation. For example, in State, ex rel. Mowrer v. Underwood, 137 Ohio St. 1, 3-6 (1940), the Court said:

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> Protection and preservation of public health are among the prime governmental concerns and functions of the state as a sovereignty. See City of Wooster v. Arbenz, 116 Ohio St., 201, 156 N.E., 210, 52 A.L.R., 518. Under the powers reserved to it by the Constitution, the state, acting through the General Assembly, may enact general laws to that end. See State, ex rel. Village of Cuyahoga Heights,v. Zangerle, 103 Ohio St., 566, 134 N.E., 686.

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> In dividing the state into health districts, the General Assembly, in the same act, also repealed the then existing statutes which authorized municipalities to establish and appoint boards of health as part of their local governments. This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, (sic) and to delegate to it all the health powers thus withdrawn from municipalities. As such, the city health district becomes an agency of the state and is governed by the laws of the state.
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> The protection and preservation of public health is of a state-wide concern, with respect to which the Legislature has jurisdiction.
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> "The health of the inhabitants of a city and the sanitary conditions existing in any one city of the state are of vast importance to all the people of the state because of the danger through social and business relations with other parts of the state of spreading contagious and infectious diseases. For this reason, the state has not delegated to the municipal authorities complete and absolute control over the health of municipalities' inhabitants." 20 Ohio Jurisprudence, 540, Section 5.
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This office has also commented generally on the importance of public health protection in several recent Opinions. Opinion No. 73-021, Opinions of the Attorney General for 1973; Opinion No. 72-088, Opinions of the Attorney General for 1972; Opinion No. 71-078, Opinions of the Attorney General for 1971.

The venereal disease program of your Board of Health has been undertaken with the specific sanction of the General Assembly. R.C. 3709.24 reads as follows:

> Each board of health of a city or general health district may provide for the free treatment of cases of gonorrhea, syphilis, and chancroid. It may establish and maintain one or more clinics for such purpose and may provide for the necessary medical and nursing service therefor. The board may provide for the quarantine of such carriers of gonorrhea, syphilis, or chancroid, as the director of health orders to be quarantined. It shall use due diligence in the prevention of such venereal diseases and shall carry out all orders and regulations of the department of health in connection therewith.

However, despite the obviously critical nature of the program being conducted by your Board of Health, and despite the difficulty it has experienced in recruiting physicians, I do not think the problem can be solved in the manner suggested by the Board. You refer to R.C. 3709.16 which provides: "No member of the board shall be appointed as health officer or ward physician." I am inclined to think that the statutory history of this Section shows that the function of the former "ward physician" is now filled by full or part-time physicians appointed by the board under the authority granted in R.C. 3709.13. The appointment of a board member as part-time physician for the board would seem, therefore, to come within the prohibition of R.C. 3709.16. But it is unnecessary to go into this question since the two positions are clearly incompatible under the common law rule long accepted in Ohio.

A recent Opinion of this office quoted the following classic expressions of that rule (Opinion No. 73-024, Opinions of the Attorney General for 1973):

> State ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909), is often cited for the following common law rule:
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> > 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.
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> Another formulation of the common law rule appears in State, ex rel. Wolf v. Shaffer, supra, which stated the following, at page 221:
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> > It was early settled at common law that it was not unlawful per se for a man to hold two offices; if the attempt to fill one disqualified the officer from performing the duties of the other, so that, for instance, in one position the officer was superior in functions to himself filling the other, * * * then he could hold but one, but if the duties of one were not in conflict with the duties of the other, then both could be held.
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> See also State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963).

The incompatibility of the two positions here is readily apparent. A physician member of a board of health, who is at the same time an employee of the board, would obviously be in a subordinate position as an employee since, under R.C. 3709.16, the board "shall determine the duties and fix the salaries of its employees."

Two of my predecessors have ruled similarly under like circumstances. In Opinions of the Attorney General for 1910, p. 1020, the question was whether a member of a city board of health could also serve as clerk thereof. My predecessor said:

> As you suggest, there is a principle of statutory construction, designated by the phrase expression unius exclusio alterius est, upon which it might, with some show of reason, be argued that because the general assembly had

> undertaken to prohibit certain appointments being made by the board of health and had failed to prohibit this particular appointment to be made, therefore, the intention was to permit the latter to be made. This principle, however, is, in my judgment, overridden in the case submitted by the paramount principle of public policy that prohibits a member of an administrative board from holding a salaried position under the authority of such board; the two positions are incompatible, and unless the general assembly has expressly authorized them to be held by the same person they may not be so held. It will not be presumed under favor of any "rule of contruction" that the general assembly intended to abrogate a principle of public policy in a given case.

And in Opinion No. 3865, Opinions of the Attorney General for 1935, the then Attorney General said at page 68:

> It is to be noticed that nowhere in Section 1261-22, supra, is there any intimation that the District Board of Health may not employ one of their own members under the provisions of this section. There is, however, a general rule of policy which prevents a member of a board or commission from appointing himself to a position under such board or commission. The general rule is stated in 46 Corpus Juris 940, as follows:
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> "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint * * *."

I must, therefore, reject the solution suggested by your Board of Health.

In specific answer to your question it is my opinion, and you are so advised, that a member of a board of health may not, at the same time, be employed by the board as a part-time physician.