

OPINION NO. 74-074

Syllabus:

Funds received by the board of trustees of a state university from an appropriation, including student instruction fees, may not be used to finance a professional leave program.

To: Claude R. Sowle, President, Ohio University, Athens, Ohio
By: William J. Brown, Attorney General, August 30, 1974

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

"Ohio University requests your formal opinion as to whether the Board of Trustees of Ohio University can lawfully fund a professional leave program.

"The request is sought to clarify the language of Amended Substitute House Bill 86. The specific language we seek clarification of is as follows:

'After July 1, 1973, and until July 1, 1975, no part of an appropriation available to the Board of Trustees...of a state university...shall be used to pay all or any part of the compensation of.... a faculty member...who is on leave of absence or has been granted a sabbatical leave and who is not engaged in rendering direct instructional, administrative, or operational service for the immediate benefit of the state-assisted institution of higher education.'

"In the previous biennium 1971-73, the prohibition of leaves and sabbaticals contained in House Bill 475 states: '...no part of this appropriation, including student instructional fees, shall be available...'

"The particular question we have is whether university funds other than those designated in Amended Substitute House Bill 86 for Ohio University, i.e. \$19,222,680 for 1973-4 and \$21,165,630 for 1974-75, can be used to fund a professional leave program. If the funds that will be used to support the program are separated for accounting purposes from the appropriated subsidy, we need to know whether student fee income can be used and/or whether 'other income' can be used to support the program.

"Further, the proposed professional leave program, to be funded from non-appropriated funds,

does involve the traditional elements of a sabbatical leave.

"Therefore, specifically we request your opinion on the following question, may Ohio University fund a professional leave program from funds other than those received as institutional subsidies appropriated to the University by Amended Substitute House Bill 86, assuming such funds are properly segregated for accounting purposes?"

Amended Substitute House Bill No. 86, the appropriation act for the current biennium, provides in part at page 60 as follows:

"After July 1, 1973, and until July 1, 1975, no part of an appropriation available to the board of trustees or the board of directors of a state assisted technical college, community college, state university, and state-affiliated university shall be used to pay all or any part of the compensation of an administrative officer, faculty member, or staff employee who is on leave of absence or has been granted a sabbatical leave and who is not engaged in rendering direct instructional, administrative, or operational service for the immediate benefit of the state-assisted institution of higher education."
(Emphasis added.)

Amended Substitute House Bill No. 475, an appropriation act for the 1971-73 biennium, provides at page 474 as follows:

"After June 15, 1972, no part of this appropriation, including student instructional fees, shall be available to the board of trustees or board of directors of a state-assisted institution of higher education for payment of all or part of the compensation of an administrative officer, faculty member, or classified employee who is on leave of absence or has been granted a sabbatical leave."
(Emphasis added.)

As the above language indicates, both of these Acts restrict the funds which may be utilized in financing sabbatical leaves. H.B. 475 provided that "no part of this appropriation, including student instructional fees" could be used to pay compensation for faculty members on sabbatical leave. This language implies that the General Assembly considered student instructional fees to be part of "this appropriation". Furthermore, the specific listing of student instructional fees as a part of the appropriation reemphasized an earlier provision of the act which stated at pages 472 and 473, that "[f]ee charges to students for instruction shall not be considered to be a price of service but shall be considered to be an integral part of the state government financing program in support of higher educational opportunity for students.

It will be recalled that the previous appropriations act referred to "this appropriation", which included student fees.

The term used in the current act, "an appropriation available to the board * * *", is on its face at least as broad a term as "this appropriation". It is unlimited with respect to the source of an "appropriation", since it covers any which is "available". There is thus no indication that the General Assembly wished to restrict the definition of that term in the current act. The reiteration of the provision which states that student fees are an integral part of the state's financing program for higher education, at page 58, bears out this construction.

H.B. 86 does contain language quite similar to that under consideration in H.B. 475. At page 60, it states as follows:

"No part of an appropriation made in this act, including student instructional fees, rotary funds, local tax levies, restricted funds or public funds, shall be available to the board of trustees of a state-assisted institution of higher education for use as travel advance money to any administrative officer, faculty member, or classified employee of said institutions. All travel expenditures except charges for the actual cost of commercial transportation shall be handled on a reimbursement basis according to regulations promulgated by the boards of trustees and within the guidelines established by the department of finance."

(Emphasis added.)

This language contains the term "appropriation made in this act", and expressly includes student instructional fees. Had the General Assembly used this term, but omitted the reference to such fees, then a strong argument could be made that such fees were not covered. Thus, if the provision here under consideration used the term "appropriation made in this act" a different conclusion might be warranted.

My conclusion is further supported by language of H.B. 86 at page 59, which reads as follows:

"In providing the appropriation in support of instructional services at state-assisted institutions of higher education and the appropriations for other instruction above, 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. Total class credit hours production per quarter per full-time faculty member is expected to meet the standards set forth in the budget data submitted by the Ohio board of regents."

This provision demonstrates clearly that the General Assembly intended its appropriations to be paid to instructors who are actually engaged in teaching students. Since student instructional fees are a part of such appropriations, and instructors who are on leave are, of course, not teaching, it would contravene this provision to pay them out of such fees.

Therefore, I conclude that student instructional fees may not be used to compensate professors who are on "professional leave" from teaching duties. However, the reasoning contained herein does not apply to funds donated to a state univer-

sity. Donated moneys are fundamentally different from those acquired by a governmental agency by taxation, fees, or assessments. Specific statutory authority is not necessary for their expenditure; they can be used for any proper purpose of the agency, consistent with any conditions imposed upon their use by donors. See Opinion No. 554, Opinions of the Attorney General for 1951, page 298, Opinion No. 4856, Opinions of the Attorney General for 1973. While these Opinions concern county law library associations, I can see no reason why the principles applied in them would not apply to governmental agencies in general.

In specific answer to your request, it is my opinion and you are so advised that funds received by the board of trustees of a state university from an appropriation, including student instruction fees, may not be used to finance a professional leave program.