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SECTION 121.12, R.C., DOES NOT PRECLUDE THE PERSON SERVING AS DIRECTOR OF HEALTH FROM TEACHING PART TIME IN THE OHIO STATE COLLEGE OF MEDICINE AND IN THE OHIO STATE COLLEGE OF NURSING, AND BEING COMPENSATED THEREFOR FROM UNIVERSITY FUNDS—§121.12, R.C.

SYLLABUS:

Section 121.12, Revised Code, does not preclude the person serving as director of health from teaching part time in the Ohio State College of Medicine and in the Ohio State College of Nursing, and being compensated therefor from university funds; said parttime course being taught on Thursday evenings and on Saturdays and not being taught at a time which would conflict with the ordinary hours when the duties of the director of health are fulfilled.

Columbus, Ohio, May 23, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The present Director of the Department of Health, in addition to the salary provided for by Section 141.03 of the Revised Code, is also receiving salaries from the Ohio State University College of Medicine and from the Ohio State University School of Nursing and certain emoluments from Rotary Fund No. 11497.

“Section 121.12 of the Revised Code requires each Director, whose office is created by Section 121.02 to ‘devote his entire time to the duties of his office, and shall hold no other office or position of profit.’

“Objection is being made to payments for services rendered other than that of Director and particularly to the payment for such services.

“That the matter may be clarified, I am asking for a formal opinion as to whether or not the Director of the Department of Public Health may engage in any other services such as teaching at the Ohio State University College of Medicine, the Ohio State University School of Nursing or receive payment from any

rotary fund established pursuant to law in addition to the payment received as Director and whether he may engage in such services in addition to his duties as Director of the Department.”

I am further informed that the present director of health has for several years taught a course in both the Ohio State School of Medicine and the Ohio State School of Nursing. For some of these years this teaching was done without compensation; in recent years compensation was paid by the university under contract. The contract with the School of Medicine has been on an annual basis. The contract with the School of Nursing has been on a quarterly basis. A specific course of instruction (preventive medicine) is taught under both contracts and the classes are held on Saturdays and on Thursday evenings.

As I understand it, Rotary No. 11497, to which you refer, is made up of funds for medical education at Ohio State University and is available for medical education. I believe it may be assumed that the teaching of preventive medicine is within the purview of medical education.

The salary of the director of health is set by Section 141.03, Revised Code, reading in part :

“The annual salaries of the following appointive state officers and employees are as follows :

“* * * * * * * * * * * * * * *”

“(F) Director of health, eighteen thousand dollars ;

“* * * * * * * * * * * * * * *”

I believe it is readily apparent that for his duties as director of health the person serving in that capacity is limited to an annual salary of eighteen thousand dollars. The instant request raises the question of such person serving in *other* capacities and receiving compensation therefor in view of the provisions of Section 121.12, Revised Code.

Section 121.12, *supra*, reads in part as follows :

“Each officer whose office is created by sections 121.02, 121.04, and 121.05 of the Revised Code shall *devote his entire time to the duties of his office, and shall hold no other office or position of profit.* * * *” (Emphasis added)

The office of the director of health is created by Section 121.02, Revised Code, thus, the provisions of Section 121.12, *supra*, apply to that office.

In my Informal Opinion No. 22, issued to the governor on April 16, 1959, I had occasion to consider the meaning of the words "shall devote his entire time to the duties of his office," as then appearing in Section 2965.03, Revised Code, and applying to members of the state pardon and parole commission. I noted in that opinion that while as to state employees forty hours is the standard work week (Section 121.16, Revised Code), there is no similar provision as to state *officers*. I then said:

"Normally, and in the absence of any specific statutory provision relative thereto, it can scarcely be said that a public *officer* is required to devote any stated amount of time to the duties of his office. Certainly this is so far as his right to compensation is concerned, such right being an incident of the office whether or not he discharges the duties of his office. See 32 Ohio Jurisprudence, 1010, Section 150.

"In the instant case, however, the officer is required by statute to "give his entire time to his official duties." In the absence of any more definite language than this it is my view that this provision must be interpreted in accord with the usual and ordinary meaning of the language used, and specifically, that this provision requires service for such period as is "normal or standard." This normal or standard amount of service will, of course, vary as the duties of the office vary.

"There are, of course, some state officers whose duties are such that, like a commanding officer under military regulations, customs and usages, are *always* on duty unless on official leave. Thus, the Governor as the chief executive officer of the state must be considered as being on duty continuously in the sense that he is subject to the call of duty at any hour of every day he is in office. Another instance of this would be the warden of the penitentiary, and perhaps the Superintendent of the Highway Patrol, who are always subject to the call of duty. In the case of officers whose duties are of a more routine nature, requiring emergency action only in the most extraordinary situations, it would seem that service is given on a "full-time" or "entire time" basis by service to such extent as is necessary to discharge efficiently all the duties of the office. We may assume with some confidence, I think, that the General Assembly did not mean by this language that public officers were to be present in their offices when there were no duties to be performed there. It follows, then, that no more is required of full-time officers than such service as is necessary to discharge fully his duties. I regard the office of member of the Pardon and Parole Commission as falling within this category."

As noted earlier, the teaching duties here concerned are of a part-time nature since classes are held only on Thursday evenings and on

Saturdays. Further, I believe that the office of director of health is not one which requires the holder thereof to be on duty at all times. Thus, in accordance with the reasoning of Informal Opinion No. 22, *supra*, I am constrained to conclude that the words of Section 121.12, *supra*, that the officer "shall devote his entire time to the duties of his office," do not preclude the person serving as director of health from engaging in the teaching services outlined in the request.

As to the words of Section 121.12, *supra*, stating that an officer "shall hold no other office or position of profit," I am of the opinion that these words refer to an office or position in government—that is, a public office or position. Thus, the question arises whether teaching at the College of Medicine and the School of Nursing constitutes the holding of a public office or position of profit.

Regarding the term "public office," it is stated in 44 Ohio Jurisprudence 2d, Section 2, page 484:

"Since one who holds an office is an officer, the term 'officer' and 'office' are paronymous and, in their original and proper sense, are to be regarded as strictly correlative. In defining a 'public officer' therefore, it becomes necessary to define a 'public office.' A public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of some portion of the sovereign power, and similar definitions by lay and legal lexicographers have been pointed out in the Ohio cases. In legal thinking, an office is an entity and may exist in fact although it is without an incumbent. As a general rule, however, the term 'office' embraces the ideas of tenure, duration, emolument, and duties, and in accordance therewith it is said that a public office is the right, authority, and duty created and conferred by law by which for a given period—either fixed by law or enduring at the pleasure of the creating power—an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

And in the same volume, Section 4, page 487, it is stated:

"* * * The duties prescribed by statute must relate to public functions, be in the interest of the people, and be independent—that is, the one performing them cannot be subject to the direction and control of a superior officer—and require the exercise of political or governmental functions."

Also in the same volume, Section 5, page 489, it is stated :

“One of the distinguishing characteristics of a public office is that the incumbent, in an independent capacity is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law. * * *”

I do not believe that a person who instructs in the Ohio State School of Medicine or School of Nursing can be said to be a public officer within the definitions noted above, as such person is certainly subject to the direction and control of superiors, does not exercise a political or governmental function, and is not clothed with a part of the sovereignty of the state.

Next to consider is whether a person who holds contracts to teach in the School of Medicine and in the School of Nursing holds a public position, or positions, of profit. In Webster's New International Dictionary, Second Edition, page 1925, the word “position” is defined as :

“* * *. d Relative place, situation, or standing; specif., social or official rank or status; standing; as, a person of position * * * hence, office; employment; situation; place * * *.”

While a “position” may in some cases be an “office,” the fact that both words are used in Section 121.12, *supra*, indicates an intention to distinguish between the two. I might also note that the word “position” is sometimes differentiated from the word “employment.” In this regard, at page 118 of Volume 14A, Words and Phrases, the case of *Wilentz, ex rel. Golat v. Stanger*, 30 A. 2d 885, 891, 129 N.T.L., 606, is cited as stating :

“* * * a ‘position’ is analogous to an office as to permanency and certainty of duties but differs in that duties may be non-governmental and not assigned to it by any public law and as distinguished from an ‘employment’ which differs from both office and position in that its duties, which are nongovernmental, are neither certain nor permanent.”

An instructor in a state university works for a public institution and his employment is, therefore, of a public nature. While in the instant case the teaching is done under contract, I am doubtful about whether the person so teaching can be said to hold a “position” rather than a mere employment. The fact that the teaching is of a part-time nature, plus the fact that it is on a year to year basis as to the Medical College and on a quarterly basis as to the Nursing College, raises considerable question as

to whether a position (or positions) is held. Further, even if either of the two employments were to be considered a "position" such would not appear to me to be the type of "position" which the legislature had in mind in the enactment of Section 121.12, *supra*. As stated by one of my predecessors in Opinion No. 896, Opinions of the Attorney General for 1933, page 815, at page 819, in referring to Section 154-16, General Code (now Section 121.12, Revised Code) :

"The provisions contained in the foregoing section to the effect that the officers mentioned shall devote their entire time to the duties of their respective offices and that they shall not hold any other offices or positions of profit simply means, in my opinion, that they shall not be regularly engaged in some activity or hold some regular positions that will, as stated by the former Attorney General, 'take their time and thought away from their duties to the state.' This does not, in my opinion, preclude them from making an occasional address at a teachers' institute or other educational gathering in contradistinction to their making a business of it, if the Director, who is the head of the department and, as such, controls, to a great extent, the activities of these officers in the performance of their official duties, permits them to do so."

The reference in the above language to a statement by the former Attorney General refers to a letter of May 6, 1924, from the then Attorney General to the then director of education. In that letter it is stated :

"However, in reference to the other questions you present as you suggest, Section 154-16 requires the Director to devote his entire time to the duties of his office, and shall hold no other office of position or profit. It is believed that the intent of this section is to prevent such a Director from holding other positions or engaging in other activities which will take this time and thought away from his duties to the State."

Also of interest in the present question is the conclusion reached by one of my predecessors on January 8, 1908, and reported in the Annual Report of the Attorney General for 1908, page 253. In that opinion my predecessor considered the effect of language appearing in 98 Ohio Laws, 368 (284d R.S.) and reading :

"Provided further, that no fees whatever, in addition to the above named salaries, shall be allowed to such officers; and provided, further, that no additional remuneration whatever shall be given any such officer under any other title than the title by which such officer was elected or duly appointed. The salaries

herein provided for shall be in full compensation for any and all services rendered by said officers and employes, payment for which is made from the state treasury.”

At page 254 of that opinion it is stated :

“There is nothing in this act to prevent an officer named therein from teaching in the university at such times as do not conflict with the proper performance of his official duties. Since the statute refers to services required by law or rendered by such officers in their official capacity, and since such teaching is not required and is done in an individual capacity, compensation may be made to persons holding the offices named in this act for services as instructors in the university.”

The reasoning of the 1908 opinion was approved and followed in an opinion of the Attorney General issued on January 5, 1909 and also in Opinion No. 439, Opinions of the Attorney General for 1913, page 152.

While the language of present Section 121.12, *supra*, differs from that found in 98 Ohio Laws, 368, *supra*, the old language did preclude an officer from receiving any remuneration under a title other than the title for which the salary is set. Thus, this is somewhat similar to the present language precluding an officer from holding a position of profit, and I believe that the reasoning of my predecessors should be given weight in resolving the instant question.

In summary, the person serving as director of health is also teaching part time at Ohio State University. While such teaching is done under contract, it is done on Thursday evenings and on Saturdays, and is not done at a time which would conflict with the ordinary hours when the duties of the director of health are fulfilled. Further, since the course taught is preventive medicine, there would appear to be no danger that the teaching will take the time and thought of the director away from his duties to the state, as preventive medicine is a subject very closely related to the duties of the director of health. And last, Ohio State University is authorized to expend funds for the furtherance of medical education and can properly pay for instruction in a course of preventive medicine.

In view of the particular fact situation here presented and in view of the ruling of my predecessors in similar questions, therefore, it is my opinion and you are advised that Section 121.12, Revised Code, does not preclude the person serving as director of health from teaching part time

in the Ohio State College of Medicine and in the Ohio State College of Nursing, and being compensated therefor from university funds; said part-time course being taught on Thursday evenings and on Saturdays and not being taught at a time which would conflict with the ordinary hours when the duties of the director of health are fulfilled.

Respectfully,

MARK MCELROY

Attorney General