

OPINION NO. 66-072**Syllabus:**

1. The Ohio Arts Council cannot employ and pay one of its members, as a director or consultant, or in any capacity.

2. Employees of the Ohio Arts Council are subject to both state civil service and Public Employees Retirement System requirements and regulations.

**To: William Taylor, Vice Chairman, Ohio Arts Council, Kent State University,
Kent, Ohio**

By: William B. Saxbe, Attorney General, April 4, 1966

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

"As you know, the last General Assembly created the Ohio Arts Council (Amended Substitute House Bill No. 7, May 13, 1965), and it was approved by Governor Rhodes, May 25, 1965. The effective date was August 24, 1965.

"The law provides for the Council of fifteen members to serve without pay. The members are appointed by the Governor, who also designates the chairman and vice chairman. Further, the bill (Sec. 3379.04) authorizes the Council to 'employ and fix the compensation of a staff director and such other personnel as will facilitate the work of the Council.'

"I would be grateful if you would provide rulings on the following:

"(1) Can the Council employ and pay one of its members, say a director or consultant, or in any capacity, for that matter.

"(2) Are employees of the Council, including consultants, automatically subject to State Civil Service requirements and regulations, and is their salary subject to deduction from matching allocations from the general assembly for the purposes of retirement benefits.

"The Council is in its first half-year of operation and we are desirous of establishing firm and legal guidelines."

Section 3379.02, Revised Code, provides in pertinent part as follows:

"There is hereby created the Ohio arts council which shall foster and encourage the development of the arts of this state and the preservation of Ohio's cultural heritage.

"The counsel shall consist of fifteen members appointed by the Governor of five-year terms. * * * Members of the council shall serve without compensation but are entitled to reimbursement for expenses incurred in connection with official business of the council.

* * * * *
(Emphasis added)

Section 3379.04, Revised Code, describes the "powers" of said Arts Council and provides in pertinent part as follows:

"The Ohio arts council may:

"(A) Within the limits of available funds, employ and fix the compensation of a staff director and such other personnel as will facilitate the work of the council. The staff director shall serve at the pleasure of the council, and other employees shall serve at the pleasure of the director."

The Ohio Arts Council, created by Sections 3379.02 to 3379.05, Revised Code, is endowed with a public function within the purview and meaning of State, ex rel., Attorney General v. Jennings, 57 Ohio St., 415, the syllabus of which reads as follows:

"To constitute a public office, against the incumbent of which quo warranto will lie. It is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment of the office, this created and defined, and not as a mere employee, subject to the control and direction of someone else."

The above case was used as authority for the following statement which appeared in the more recent case of State, ex rel., Milburn v. Pethel, 153 Ohio St., 1; paragraph 1 of the syllabus is as follows:

"1. A public officer, as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise func-

tions either of an executive, legislative or judicial character."

Based upon the above and foregoing, it is my opinion that membership on the Ohio Arts Council constitutes holding a public office. However, it is my further opinion that a director or consultant for pay employed by said Council would not be considered a public officer but rather an employee.

The Ohio Arts Council may employ and fix the compensation of a staff director; the staff director shall serve at the pleasure of the Council. Other employees shall serve at the pleasure of the director (Section 3379.04, supra). Therefore, it is my opinion and from the latter facts, the conclusion is inescapable that incompatibility of offices would necessarily exist if a member of the said Council were appointed as a director, consultant, or in some other capacity in the employ of the Council for pay.

Although the matter of incompatibility as raised herein concerns a public office and perhaps public employment, I believe the common law test of incompatibility as stated in the case, State, ex rel., Attorney General v. Gebert, 12 C. C. (N.S.) 274, to be applicable. See Opinion No. 65-150, Opinions of the Attorney General for 1965, page 2-335. It is stated in the Gebert case, supra, at page 275, in part as follows:

"Offices are considered incompatible when one is subordinate to or in any way a check upon the other * * *."

Clearly, any person serving as both a member of the Council and as an employee of the Council, would serve in one position which would be subordinate to the other.

The remainder of this opinion is devoted to answering your second question as to whether employees of the Council, including consultants, are automatically subject to State Civil Service requirements and regulations; and is their salary subject to deduction for the purposes of retirement benefits. I have determined that the Ohio Arts Council is a public body and the members thereof public officers, and the employees of the Council are public employees.

Section 143.01, Revised Code, provides in pertinent part as follows:

"As used in Sections 143.01 to 143.48, inclusive, of the Revised Code:

"(A) 'Civil service' includes all offices and positions of trust or employment in the service of the state * * *."

(Emphasis added)

Therefore, based upon the above, it seems apparent that the legislature intended that employees of the Ohio Arts Council be subject to state civil service requirements and regulations.

Section 145.01, Revised Code, provides in pertinent part as follows:

"As used in Chapter 145. of the Revised Code:

"(A) 'Public employees' means any person holding an office, not elective, under the state or any * * * or employed and paid in whole or in part by the state or any of the authorities named in this division in any capacity. * * *

"* * * * *"

"In all cases of doubt the public employees retirement board shall determine whether any person is a public employee, and its decision is final.

"* * * * *"
(Emphasis added)

It is obvious that employees of the Ohio Arts Council come within the definition of persons employed or paid in whole or in part by the state.

In answer to the specific questions posed by your request, it is my opinion and you are so advised that:

1. The Ohio Arts Council cannot employ and pay one of its members, as a director or consultant, or in any capacity.
2. Employees of the Ohio Arts Council are subject to both state civil service and Public Employees Retirement System requirements and regulations.