

OPINION NO. 88-022**Syllabus:**

The Director of Health may serve as a clinical associate professor of medicine at Wright State University without compensation from the University where his teaching duties involve the instruction of medical students who accompany him while he is treating patients only on weekends at a privately owned outpatient clinic.

To: Ronald L. Fletcher, M.D., Director, Department of Health, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your opinion request in which you ask whether the Director of Health may also hold the position of clinical associate professor of medicine at Wright State University. You state that your teaching duties consist of two parts. One course involves having students accompany you while you perform your duties as Director of Health. The other course involves your service on Sunday afternoons at a clinic used by Wright State University as part of its clinical externship program. You further state that your arrangement with the University is not contractual and that you receive no compensation from the University. Rather, you are paid by a private corporation for your treatment of patients at the clinic. Based upon the facts presented, you question the propriety of your simultaneous status as Director of Health, clinical associate professor of medicine at Wright State University, and employee of the private corporation by whom you are compensated for your work at the clinic. As stated in 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph one): "The common law test of incompatibility is applicable to the simultaneous holding of a *public* office and a *public* employment by the same person." (Emphasis added.) Under this rule, the propriety of your holding the positions of Director of Health and clinical associate professor of medicine at Wright State University must be determined.¹

The position of Director of Health is created by R.C. 121.02. The appointment of the Director is provided for in R.C. 121.03(A) which states in part:

¹ As stated in 1970 Op. Att'y Gen. No. 70-168 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100) at 2-335: "The question of compatibility of offices does not actually arise if one of the offices involved is a private rather than a public office." Thus, in your situation, although you allow Wright State University medical students to accompany you at the clinic, for which you receive no compensation from the University, your compensation for the treatment of patients at the clinic is paid by a private corporation. Where a person holds a public position and a private position, although the question of compatibility of public positions does not arise, it is necessary to determine whether such person would act as a check upon himself or otherwise be subject to a conflict of interest. See 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph two) ("[b]ecause a county home physician is not a county employee, a compatibility analysis is inappropriate in determining whether a county coroner may concurrently serve as county home physician").

"The following administrative department heads shall be appointed by the governor, with the advice and consent of the senate, and shall hold their *offices* during the term of the appointing governor but subject to removal at the pleasure of the governor:...(17) The director of health..."(Emphasis added.) *See generally* R.C. 121.12 (referring to "each officer whose office is created by [R.C. 121.02]..."); 1953 Op. Att'y Gen. No. 2906, p. 329 (syllabus, paragraph two) ("[t]he director of health, being appointed for a five year term by virtue of [G.C.154-12 (currently R.C. 121.10)] is an officer within the purview of Article II, Section 20, Constitution").² Thus, the position of Director of Health, for purposes of a compatibility analysis, is a public office.

Concerning your position as clinical associate professor of medicine at Wright State University, I note initially that, pursuant to R.C. 3345.011, Wright State University is a state university, defined in that section as, "a public institution of higher education which is a body politic and corporate." The University's college of medicine is provided for in R.C. 3352.06 which requires the board of trustees of Wright State University, in cooperation with Central State and Miami Universities, to "create, organize, provide for, and maintain a college of medicine," and empowers them to "make and enter into all contracts and agreements necessary or incidental to the operation of the college." Specifically concerning university personnel matters, R.C. 3352.03 states: "The board of trustees of Wright state university shall employ, fix the compensation of, and remove, the president and such number of professors, teachers, and other employees as may be deemed necessary."

You state that, as clinical associate professor of medicine, you receive no compensation from Wright State University. Further, you state that your position at the University is not subject to contract. Although compensation and a contractual agreement are commonly part of the employment relationship between universities and their faculty members, *see generally* 1980 Op. Att'y Gen. No. 80-037, they are not essential parts. Rather, since state universities have extremely broad powers in fixing the terms and conditions of faculty members' employment, 1986 Op. Att'y Gen. No. 86-046, pursuant to the arrangement you describe, you have been granted the authority to act as a clinical associate professor of medicine at Wright State University, which is, for purposes of a compatibility analysis, a position of public employment. *See generally* 1979 Op. Att'y Gen. No. 79-032 at 2-109 ("the authority of a [state university] board of trustees is so sweeping that it has been held that a direct or specific statute is unnecessary to confer a particular power upon it. Rather, it is possessed of all powers incidental to the administration of a university unless specifically limited by statute").

The seven question format within which to analyze a question of compatibility of a public office and a public employment is set forth in Op. No. 79-111 at 2-367 through 2-368 as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?

² As concluded in 1981 Op. Att'y Gen. No. 81-049, however, directors of administrative departments created pursuant to R.C. 121.02 are, for purposes of R.C. Chapter 124, "employees," as defined in R.C. 124.01(F), even though they may otherwise be properly classified as public officers.

6. Are there local charter provisions or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

In analyzing the compatibility of the positions of Director of Health and clinical associate professor of medicine at a state university, I note that question six of the analysis is inapplicable and, further, that question seven is also inapplicable since no regulation of which I am aware prohibits a person from simultaneously holding both positions.

Turning now to the first question, I note that R.C. 124.57 generally prohibits employees in the classified civil service from engaging in partisan political activity. *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); 1984 Op. Att'y Gen. No. 84-041. However, pursuant to R.C. 124.11 (A)(3), the position of Director of Health is included in the unclassified service. See generally R.C. 121.03 (appointment of administrative department heads, including the Director of Health, by the Governor with the advice and consent of the Senate). Similarly, the position of clinical associate professor at a state university falls within the provisions of R.C. 124.11 (A)(7)(a) and is not, therefore, a position in the classified service for purposes of R.C. 124.57.³ See *State ex rel. Trettien v. Mahon*, 16 Ohio L. Abs. 633, 635 (Ct. App. Lucas County 1934) (finding that G.C. 486-8 (predecessor of R.C. 124.11) "specifically exempts persons engaged in educational duties connected with colleges and universities"). Since both positions, Director of Health and clinical associate professor of medicine, are in the unclassified service, the provisions of R.C. 124.57 have no application.

The second question in the compatibility analysis set forth in Op. No. 79-111 is whether the empowering statutes of either position prohibit outside employment. With respect to your position at Wright State University, I am unaware of any statutory provision which would prohibit your serving as Director of Health while a professor at the University's medical college. In several prior opinions of this office, the propriety of outside employment by university professors, while not directly at issue, has been treated as though a common practice. See, e.g., Op. No. 86-046 (syllabus) ("[t]he board of trustees of a state university that maintains and operates a college of medicine may permit faculty members of the university, as compensation in kind for services rendered, to maintain private medical practices on university property, and utilize university facilities, personnel, and services in conjunction therewith. To the extent that such use of university property, facilities, personnel, and services is not intended to be compensation in kind for services rendered, the board of trustees must require reimbursement of the university for such use"); 1973 Op. Att'y Gen. No. 73-020 (syllabus) ("[t]he 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").

Concerning the empowering statutes related to the position of the Director of Health, it is necessary to examine R.C. 121.12 which states in part: "Except as otherwise authorized in [R.C. 108.05], each officer whose office is created by [R.C. 121.02, 121.04, and 121.05] shall devote his entire time to the duties of his office, and shall hold no other office or position of profit." As set forth above, the position of Director of Health is created by R.C. 121.02. It is, therefore, necessary to determine whether R.C. 121.12 prohibits the Director of Health from acting as clinical associate professor of medicine at Wright State University.

³ I am unaware of any action taken that would exempt the position of clinical associate professor of medicine at Wright State University from the unclassified service pursuant to R.C. 124.11(A)(7)(a).

In an opinion which considered the applicability of R.C. 121.12 to facts very similar to those you present, one of my predecessors concluded:

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.

1961 Op. Att'y Gen. No. 2202, p. 238 (syllabus). The Attorney General stated that the position of Director of Health is not a public office in which the holder of that office must be subject to the call of duty at any time of the day. Thus, especially where the classes which the Director taught were held in the evening and on weekends, the portion of R.C. 121.12 requiring certain officers to devote their entire time to the duties of their offices did not preclude the Director of Health from engaging in the teaching services as described above.

1961 Op. No. 2202 also examined the portion of R.C. 121.12 prohibiting the officers to which that section applies from holding any "other office or position of profit," and concluded at 241: "I am of the opinion that these words refer to an office or position *in government* - that is, a *public* office or position" (emphasis added). In examining whether teaching part time under contract at the Ohio State College of Medicine and College of Nursing constitutes the holding of an "office or position of profit," my predecessor concluded, in part, that such a teaching position is not a public office. The opinion reasons that, since the teacher "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," 1961 Op. No. 2202 at 242, he does not come within the common definition of a public officer. See generally *State ex rel. Landis v. Board of Commissioners*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917) ("[i]f official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment").

Concerning whether a contract teaching position at a state university constitutes a "position of profit" for purposes of R.C. 121.12, the opinion states:

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.

1961 Op. No. 2202 at 242-43.

I am aware, however, of two prior Attorney General opinions which might appear to contradict the conclusions reached in 1961 Op. No. 2202. 1950 Op. Att'y Gen. No. 2143, p. 554, analyzed the applicability of G.C. 154-16⁴ (predecessor of R.C. 121.12) to the position of assistant director of the Department of Health. The opinion concludes in paragraph one of the syllabus: "Because of the provisions of Section 154-16 of the General Code (now R.C. 121.12), an Assistant Director of the

⁴ G.C. 154-16, as enacted in 1921 Laws of Ohio 105 (H.B. 249, approved April 26, 1921), stated in pertinent part: "Each officer whose office is created by sections 154-3, 154-5, and 154-6 of the General Code shall devote his entire time to the duties of his office, and shall hold no other office or position of profit."

Department of Health may not serve simultaneously as Chief of the Bureau of Direct Services in the Department of Health if he is entitled to *and receives* separate compensation in each position." (Emphasis added.) Concerning the applicability of G.C. 154-16 (now R.C. 121.12) to the assistant director of health, 1950 Op. No. 2143 states at 557:

It is to be noted that this section specifically provides that an officer whose office is created by Section 154-5, supra, "shall devote his entire time to the duties of his office, *and shall hold no other office or position of profit.*" (Emphasis added.) Therefore, regardless of the question of compatibility or incompatibility of offices or positions, it is apparent that...the Assistant Director...is precluded from accepting or occupying any other office or position within the Department of Health which would entitle him to compensation separate and distinct from that received in his capacity as an Assistant Director. Hence, it is my opinion that [a person] cannot serve simultaneously as Assistant Director and as Chief of the Bureau of Direct Services in the Department of Health, *if he is entitled to and is receiving separate compensation in each position.* (Emphasis added.)

Similarly, 1931 Op. Att'y Gen. No. 3462, vol. II, p. 1019, analyzed the application of G.C. 154-16 (now R.C. 121.12) to the position of assistant director of education. Without analysis of the phrase, "other office or position of profit," as used in the statute, the opinion merely concludes that the assistant director of education, as created by then G.C. 154-5 (now R.C. 121.05), is prohibited by G.C. 154-16 (now R.C. 121.12) "from teaching at the Ohio State University *for pay*, as such teaching would clearly constitute the holding of a position for profit," (emphasis added). 1931 Op. No. 3462 at 1021. Unlike 1961 Op. No. 2202, 1931 Op. No. 3462 made no distinction between the words "employment" and "position," as used in the statute, and concluded that teaching at Ohio State University for pay constitutes a "position of profit," within the meaning of G.C. 154-16 (now R.C. 121.12).

The clear distinction between the conclusions reached in 1950 Op. No. 2143 (syllabus, paragraph one) and 1931 Op. No. 3462 and the situation about which you ask is that in your duties as clinical associate professor of medicine at Wright State University, you are receiving no compensation from the University. Although you are compensated by a private corporation for the services you provide patients at the clinic, you receive no compensation for the instruction you provide the students who accompany you either while you treat patients at the clinic or while you are acting in your capacity as Director of Health. Since you do not receive compensation from the University for your teaching services, your situation is distinguishable from those addressed in 1950 Op. No. 2143 and 1931 Op. No. 3462.

After separately analyzing each portion of the above-quoted R.C. 121.12, 1961 Op. No. 2202 examines the provisions of R.C. 121.12 in their entirety and concludes that the intent of the statute appears to be that such officers "shall not be regularly engaged in some activity or hold some regular positions that will...take their time and thought away from their duties to the state." 1961 Op. No. 2202 at 243 (quoting 1933 Op. Att'y Gen. No. 896, vol. I, p. 815, 819). 1961 Op. No. 2202 then summarizes the factual and legal bases for finding the holding of the two positions not to be prohibited by R.C. 121.12, as follows:

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.

1961 Op. No. 2202 at 244. The opinion, therefore, finds that R.C. 121.12 does not preclude the Director of Health from serving simultaneously as a part-time instructor at the Ohio State University College of Medicine and College of Nursing.

Further support for the conclusion reached in 1961 Op. No. 2202 that the phrase "office or position of profit" should be read narrowly is found in the general rule of statutory construction set forth in *Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927), that the General Assembly, "[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended." In this regard, I note that the General Assembly has enacted other laws containing prohibitions similar to that set forth in R.C. 121.12, but has used language in such other statutes that may more appropriately encompass the position of uncompensated part-time university professor. Cf. R.C. 121.12 with R.C. 3304.14 (stating, in part, that: "[t]he rehabilitation services commission shall appoint an administrator...[who] shall devote his entire time to the duties of his office, shall hold no other office of trust and profit, and shall engage in no other business during his term of office") and R.C. 4141.02 (stating, in part: "[e]xcept as otherwise authorized in [R.C. 108.05], the administrator [of the bureau of employment services] shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duties as administrator or serve on any committee of any political party"). The language employed in R.C. 121.12, therefore, does not necessarily prohibit an officer designated in that section from also serving as an uncompensated, part-time state university professor.

The third question in the analysis of the compatibility of two public positions is whether one office is subordinate to, or in any way a check upon, the other. As set forth above, the Director of Health is appointed by the Governor with the advice and consent of the Senate to hold his office during the term of the appointing Governor, but subject to removal by the Governor. R.C. 121.03. The Director is, therefore, responsible to the Governor. As a professor at the Wright State University medical college, your duties are not subordinate to, or a check upon, your duties as Director of Health. Pursuant to R.C. 3352.06 which provides for the creation of the Wright State University college of medicine, the board of trustees of Wright State University, in cooperation with the boards of trustees of Central State University and Miami University, "may make and enter into all contracts and agreements necessary or incidental to the operation of the college." More specifically, R.C. 3352.03 imposes upon the Wright State University board of trustees the duty to "employ, fix the compensation of, and remove,...such number of professors, teachers, and other employees as may be deemed necessary," and to "do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university." Thus, it is the board of trustees, ultimately, to whom the university's professors are answerable. I conclude, therefore, that neither the position of Director of Health nor the position of clinical associate professor of medicine at Wright State University is a check upon, or subordinate to, the other position.

The fourth question to be answered in considering the compatibility of two public positions is whether it is physically possible for one person to discharge the duties of both positions. You have provided the following information concerning your teaching duties for Wright State University:

I do not receive compensation of any kind from [Wright State University (WSU)]. My oral agreement with WSU regarding the acceptance of medical students for clinical rotations on Sunday afternoons is voluntary, and there are no requirements that I offer instruction to students while they accompany me in the performance of my duties as the Director of the Ohio Department of Health....The medical students are not accompanying me while I am at the Department; however, the students who do accompany me on Sunday afternoons at the clinic are informed that I am the Director of the Department and instructed on the importance of the physician's role in my position and the significance of public health and preventive medicine.

Based upon your description of your teaching duties, I have no basis for concluding that it is not physically possible for one person to discharge the duties of both positions. See 1980 Op. Att'y Gen. No. 80-037 at 2-154 ("the nature of a university professorship demands irregular hours"); 1961 Op. No. 2202 at 241 ("the

office of director of health is not one which requires the holder thereof to be on duty at all times").

The final question to be addressed in analyzing the compatibility of the two positions about which you ask is whether there is a conflict of interest between the two positions. The purpose for this part of the analysis is set forth in 1970 Op. Att'y Gen. No. 70-168 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100) at 2-336 as follows:

Any public officer owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public. (Citation omitted.)

Although, as set forth above, a compatibility analysis is not appropriate where considering the permissibility of a public officer's simultaneous holding of a private position, an examination of potential conflicts of interest is appropriate in such a situation. I will, therefore, address potential conflicts which may arise between your position as Director of Health and your position as physician at the clinic, as well as your position at Wright State University. See 1987 Op. Att'y Gen. No. 87-025 at 2-178 ("[e]ven though a compatibility analysis does not apply to the situation [in which a person holds but a single public office or employment], the question of conflict of interest can apply even if only one of the positions is a public office.") In addition, I note that, in the situation about which you ask, your duties in your employment as a teacher and as a physician at the clinic are obviously not defined by statute and the resolution of many conflict of interest questions depends upon an examination of the specific duties and functions performed in the positions involved. See generally Op. No. 86-046 at 2-245 (a state university board of trustees' statutory authority to enter into contracts of employment with faculty members necessarily includes the power to set the terms and conditions of faculty members' employment contracts). In answering this question, I will, therefore, address potential conflicts only in general terms.

It is first necessary to examine the powers and duties of the Director of Health. R.C. 3701.03, setting forth the general duties of the Director of Health, states:

The director of health shall perform such duties as are incident to his position as chief executive officer. He shall administer the laws relating to health and sanitation and the regulations of the department of health. He shall prepare sanitary and public health regulations for consideration by the public health council and shall submit to said council recommendations for new legislation. The director shall sit at meetings of the council but shall have no vote.

Further duties are imposed upon the Director of Health by R.C. 3701.04 which states in part:

The director of health shall:

(A) Require such reports and make such inspections and investigations as he deems necessary;

...
(C) Procure by contract the temporary or intermittent services of experts or consultants or organizations thereof when such services are to be performed on a part-time or fee-for-service basis and do not involve the performance of administrative duties;

(D) Enter into agreements for the utilization of the facilities and services of other departments, agencies, and institutions, public or private;

(E) Accept on behalf of the state and deposit with the treasurer of state any grant, gift, or contribution made to assist in meeting the cost of carrying out [R.C. 3701.01, .04, .08, .09, and .36-.45, inclusive], and expend the same for such purpose;

(F) Make an annual report to the governor on activities and expenditures including recommendations for such additional legislation as he considers appropriate to furnish adequate hospital, clinic, and similar facilities to the people of this state.

In addition to the general powers and duties imposed upon the Director of Health by the above-quoted statutes, specific duties with respect to licensing, issuance of permits, advisory duties, and the acceptance and distribution of various grants are imposed upon the Department of Health and the Director by various provisions throughout R.C. Title 37. See, e.g., R.C. 3701.023 (Department of Health's administration of programs, including the program for services to medically handicapped children); R.C. 3701.08(B) (Department of Health is sole state agency for developing and administering state plan for construction and modernization of public and other nonprofit hospitals and medical facilities as provided in R.C. 3701.01, .04, .08, .09, and .36-.45); R.C. 3701.131(C) (Director of Health's acceptance and administration of grants for carrying out programs related to sickle cell disease); R.C. 3701.141(C) (Director of Health's acceptance and administration of grants for carrying out programs related to alcoholism); R.C. 3701.143 (Director of Health's control over permits issued to qualified persons to perform tests of blood for alcohol content); R.C. 3701.262(C) (Director of Health's duties respecting the acceptance and administration of grants with regard to the cancer epidemiology and surveillance program outlined in R.C. 3701.262(A)); R.C. 3701.502(C) (Director of Health's acceptance and administration of grants for programs related to genetic diseases); R.C. 3701.61-.69 (program for reimbursement of hospitals caring for indigent patients suffering from motor vehicle injury); R.C. 3701.71 (Department of Health's establishment and maintenance of minimum standards for, *inter alia*, voluntary and governmental hospitals); R.C. 3701.92 (powers and duties of Director of Health concerning radiation control, *see generally* R.C. 3701.90-.98); R.C. 3712.04 (licensing of hospice care programs by Department of Health); R.C. 3720.03 (duties of Director of Health with regard to prevention and treatment of alcoholism); R.C. 3721.02 (duty of Director of Health to license "homes," as defined in R.C. 3721.01(A), and establishment of procedures for inspection and licensing of such homes); R.C. 3727.04 (inspection of hospitals, as defined in R.C. 3727.01, by Director of Health).

Although you indicate that most of the functions you perform as Director of Health in no way relate to your activities at the clinic or to your instructional duties at the Wright State University's college of medicine, you do acknowledge that several potential conflicts of interest may exist. As set forth in Op. No. 79-111 at 2-372:

The factors to be considered with respect to questions of potential conflicts are the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls. Thus, not all potentialities for conflict will render positions incompatible....

In the supplementary information which you have provided, you state that the medical college of Wright State University received two grants under R.C. 3701.141 (alcoholism research and education) in fiscal year 1986, but is not currently receiving such funds. As Director of Health, you are required to accept and administer grants for education and research concerning alcoholism, R.C. 3701.141(C); at the same time, as a professor at the medical college, your employer would obviously benefit by receipt of a grant administered by you in your other public position. Although the University is not currently the recipient of a grant under R.C. 3701.141, I assume that it is still eligible for such a grant and, thus, there exists a potential conflict of interest. In this regard, I note that your description of your duties at the University do not include decision-making authority concerning the medical college's application for grants administered by you in your capacity as Director of Health. Moreover, whether the University will seek a grant under R.C. 3701.141 is, at this time, merely a matter of speculation. In light of these facts, I

am unable to conclude that this particular potential conflict of interest is sufficient to render the two positions incompatible. *See* Op. No. 79-111 (syllabus, paragraph three) ("[w]here possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated"). I caution, however, that should the University apply for such a grant, the fact that the Director of Health has a statutory duty to administer such grants, and exercises decision-making authority in the administration of such grants, would appear to create a conflict sufficient to render the two positions incompatible.

The other potential conflict you mention arises from the radiation control program established in R.C. 3701.90-.98. The powers and duties of the Director of Health under this program are set forth, in part, in R.C. 3701.92. Pursuant to division (A), the Director of Health or his authorized representative is responsible for the inspection of sources of radiation. R.C. 3701.92(C)(1) imposes upon the Director of Health the duty generally to administer and enforce R.C. 3701.90-.98. Further, R.C. 3701.95 imposes upon the Director of Health or his authorized representative the duty to institute proceedings for violations of R.C. 3701.90-.98 or the rules adopted thereunder. R.C. 3701.97 sets forth procedures to be followed by the Director of Health in cases of violation of R.C. 3701.90-.98.

With regard to your position at the University and your practice at the clinic, you state:

The WSU School of Medicine is directly associated with two ambulatory care clinics, both of which are owned by WSU, that possess five units of radiology equipment. The clinics, therefore, are required to be registered with and inspected by the Department....

The clinic where I practice has one item of radiology equipment and, therefore, is required to be registered with and inspected by the Department....

Thus, as Director of Health, you or your representative must inspect radiation sources owned by your employer, Wright State University, in your position as professor of medicine. Similarly, as Director of Health, you or your representative has a duty to inspect the radiology equipment at the clinic where you are privately employed. Further, the Director of Health is empowered to institute proceedings in case of any violation of the radiation control program. *See generally* R.C. 3701.95 and R.C. 3701.97. The duties enjoined upon the Director of Health to enforce the radiation control program might, therefore, give rise to a potential conflict of interest due to the radiation equipment owned by Wright State University and by the clinic where you are privately employed. By applying the analysis of Op. No. 79-111, however, I find the potential conflict to be insufficient to render your public positions incompatible or to prevent your being employed at the privately owned clinic while serving as Director of Health. Certainly, the duties of the professorship which you hold have no involvement with the operation of Wright State's radiation equipment. Concerning your employment at the privately owned clinic, it is important to note that you work there only part time and do not appear to function in a decision-making capacity at the clinic. Further, the potential conflicts in your administration of the radiation control program and your other positions involve no budgetary matters. In addition, while enforcement of the laws and regulations related to radiation equipment is important, it is not among the primary functions of the Director of Health. Finally, in the unlikely event that you were directly drawn into a conflict as Director, you could resolve the conflict by resigning your teaching position or your position at the clinic. Thus, since the possibility of a conflict of interest arising out of your duties as Director of Health with respect to the radiation control program is so remote and speculative, it alone is not a sufficient basis for finding that the Director of Health may not be employed by the clinic under the circumstances you describe or teach at a state university medical college under the terms described in your opinion request.

Although not specifically mentioned in your letter, R.C. 3701.25 represents a potential conflict of interest in your position as Director of Health and your services as a physician at the clinic. Pursuant to R.C. 3701.25, a physician who attends or who is called in to visit a patient whom he believes to be suffering from certain occupational diseases or ailments is required to file a report thereof with the

Director of Health. Violation of R.C. 3701.25 is a minor misdemeanor on a first offense or, on subsequent offenses, a misdemeanor of the second degree. R.C. 3701.99(A). As with the other potential conflicts discussed above, however, this possible conflict of interest is not sufficient to prohibit the Director of Health from being privately employed to treat patients.

Pursuant to R.C. 121.10, the Director of Health:

shall be a physician holding the degree of doctor of medicine from a medical college approved by the state medical board and who, before assuming his duties, shall have been licensed to practice medicine in the state. He shall have had experience in pursuing some phase of medical practice, and additional experience in public health administration.

In light of the requirements for serving as Director of Health, it appears likely that anyone serving in such position would, during his tenure as Director, continue to treat patients. The situation described in R.C. 3701.25, necessitating the filing of a report with the Director of Health, could conceivably arise in the treatment of any patient. Thus, I find that the potential for a conflict of interest arising under the provisions of R.C. 3701.25 is insufficient to prohibit the Director of Health from being privately employed to treat patients at a clinic. Cf. Op. No. 87-025 (finding no conflict between the duties of county coroner and county home physician, even though the county coroner has certain duties with regard to the investigation of any suspicious or unusual deaths).

Based upon the foregoing, it is my opinion and you are hereby advised that, the Director of Health may serve as a clinical associate professor of medicine at Wright State University without compensation from the University where his teaching duties involve the instruction of medical students who accompany him while he is treating patients only on weekends at a privately owned outpatient clinic.