

OPINION NO. 79-108**Syllabus:**

1. The "total salary" limitation of fifty-five thousand dollars set forth in R.C. 141.01 applies on a calendar-year basis. The "total compensation" limitation of fifty-five thousand dollars applicable under R.C. 124.151 to licensed physicians employed by the Department of Mental Health and Mental Retardation applies on the basis of any twelve consecutive months.
2. The fifty-five thousand dollar per year maximum set forth in R.C. 124.151 is the maximum amount which the Department of Mental Health and Mental Retardation may pay a physician for performing the functions of a classification title requiring a licensed physician, regardless of the number of positions filled by the physician while performing those functions.

To: Timothy B. Moritz, M.D., Director, Ohio Department of Mental Health and Mental Retardation, Columbus, Ohio

By: William J. Brown, Attorney General, December 27, 1979

I have before me your request for my opinion regarding the following questions:

1. Should the fifty-five thousand dollar per year pay limitation set forth in R.C. 141.01 and R.C. 124.151 be applied on a fiscal or a calendar year basis?
2. Does the fifty-five thousand dollar per [year] maximum set forth in R.C. 124.151 apply to each position filled by a physician who holds more than one state position, or does the maximum apply to each physician, regardless of the number of positions filled by that physician?

Your initial inquiry asks whether the pay limitations established by R.C. 141.01 and R.C. 124.151 apply on a fiscal or calendar year basis. That question is easily answered in the case of R.C. 141.01 which provides for a maximum \$55,000 salary "per calendar year" (emphasis added). The answer is not quite so simple relative to R.C. 124.151 which states:

Notwithstanding any other provision of law, the department of mental health and mental retardation may establish a supplementary compensation schedule to provide for additional compensation for those licensed physicians employed by the department in positions requiring a licensed physician. The supplementary compensation schedule, together with the compensation otherwise authorized by this chapter, shall provide for the total compensation for these employees to range appropriately, but not necessarily uniformly, for each classification title requiring a licensed physician, not to exceed fifty-five thousand dollars per year, in accordance with a schedule recommended by the director of the department and approved by the controlling board. The individual salary levels recommended for each such physician employed shall be approved by the state employee compensation board. Notwithstanding any other provision of law, such personnel are to be in the unclassified civil service. (Emphasis added.)

R.C. 124.151 adopts the same fifty-five thousand dollar figure as R.C. 141.01, but its language is different and there is no express reference to "calendar year." Rather, R.C. 124.151 describes the limitation only as a limitation "per year." Absent any statutory indication that the limitation applies on a fiscal or calendar year, the general definition appearing in R.C. 1.44(B) is applicable. That definition provides:

"Year" means twelve consecutive months.

This interpretation is consistent with R.C. 127.16(D) which provides for controlling board approval or competitive bidding for purchases of services which cost in the aggregate ten thousand dollars or more over a "twelve-month period" with no specification as to calendar or fiscal year.

In specific answer to your first question, the "total salary" limitation of fifty-five thousand dollars set forth in R.C. 141.01 applies on a calendar year basis. The "total compensation" limit applicable under R.C. 124.151 applies on the basis of any twelve consecutive months. It is my further opinion that payments to physicians employed by the Department of Mental Health and Mental Retardation are governed by R.C. 124.151 as opposed to R.C. 141.01. The latter is a general statute which establishes the annual salary for all elected state officials and further provides that "unless a higher salary is explicitly established by statute" no officer or employee of any state-assisted institution or agency shall be paid a total salary that exceeds \$55,000 per calendar year. R.C. 141.01 recognizes that other more-targeted statutes may "explicitly establish" different pay ceilings for specific officers or employees. Moreover, R.C. 124.151 (which singles out physicians employed by the Department of Mental Health and Mental Retardation) states that its total compensation provision applies "[n]otwithstanding any other provision of law." If the total compensation provided in R.C. 124.151 were, by way of example, \$60,000 it could hardly be contended that the lower salary provided in R.C. 141.01 applied to such physicians. Since R.C. 124.151 is a more specific statute than R.C. 141.01, its terms apply to persons within its purview to the extent that there are any differences between it and the general provisions of R.C. 141.01. Cincinnati v. Bossert Machine Co., 16 Ohio St. 2d 76 (1968); State ex rel. Steller v. Zangerle, 100 Ohio St. 414 (1919). Hence, the total compensation paid to licensed physicians employed by the Department of Mental Health and Mental Retardation is governed by R.C. 124.151 and the annual limitation expressed therein must be judged on the basis of any twelve consecutive calendar months.

Your second question is whether the fifty-five thousand dollar per year maximum set forth in R.C. 124.151 applies to each position filled by a physician who

holds more than one state position, or whether the maximum applies to each physician, regardless of the number of positions filled by that physician. R.C. 124.151 applies only to physicians employed by the Department of Mental Health and Mental Retardation; thus, when you speak of "more than one state position," I assume that you mean more than one position with the Department of Mental Health and Mental Retardation.

R.C. 124.151 requires that personnel covered thereby be in the unclassified civil service. You have informed me that, when a physician is employed by the Department of Mental Health and Mental Retardation as a civil service employee under R.C. 124.151, the physician works a full 40 hour week and any compensation over and above the limit stated in R.C. 124.151 would be paid by means of "side" contracts or dual employment arrangements and would be for work in excess of 40 hours per week. Further, this additional, overtime compensation would be expressed in terms of a specified number of dollars per hour of actual work. Finally, the excess services provided would be substantially identical to those provided during the 40 hour base period.

With these facts in mind, we turn to a consideration of the key statutes. R.C. 124.151 permits the Department to establish a "supplementary compensation schedule to provide for additional compensation" for its licensed physicians. The critical portion of the statute states:

The supplementary compensation schedule, together with the compensation otherwise authorized by this chapter, shall provide for the total compensation for these employees to range appropriately, but not necessarily uniformly, for each classification title requiring a licensed physician, not to exceed fifty-five thousand dollars per year, in accordance with a schedule recommended by the director of the department and approved by the controlling board. (Emphasis added.)

The monetary limitation is expressed in terms of "total compensation." The language of the statute demonstrates that the term "total compensation" consists of the following two elements:

- (1) Any compensation "authorized" by R.C. Ch. 124; and
- (2) A "supplementary compensation schedule."

We begin by asking what compensation is "authorized" by R.C. Chapter 124. R.C. 124.15 establishes a trio of salary/wage "schedules" containing 49 pay ranges. These schedules are expressed in terms of both an hourly wage and an annual salary, to wit:

Schedule C

PAY RANGE AND VALUES

RANGE	MIMINUM	MAXIMUM
41 Hourly	9.04	12.11
41 Annually	18803.20	25188.80
42 Hourly	9.96	13.36
42 Annually	20716.80	27788.80
43 Hourly	10.98	14.73
43 Annually	22838.40	30638.40

Applying simple mathematics, it is obvious that the annual salary is derived by multiplying the prescribed hourly rate times a 40 hour work week and then multiplying the product times a 52 week work year (i.e., 2080 hours per year).

¹Employment by other departments or agencies of the State of Ohio would be governed by the general provisions of R.C. 141.01.

In addition to the foregoing, R.C. Chapter 124 authorizes overtime pay. R.C. 124.18 prescribes a standard work week of 40 hours and then states:

When any employee is required by an authorized administrative authority to be in an active pay status more than forty hours in any calendar week, he shall be compensated for such time over forty hours, except as otherwise provided in this section, at one and one-half times his base rate of pay, or at the rate equivalent to pay range 33, step 1, whichever is the lesser, unless the provisions of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 201, as amended, are applicable. A flexible hours employee is not entitled to compensation for overtime work unless his authorized administrative authority requires him to be in active pay status for more than forty hours in a calendar week, regardless of the number of hours he works on any day in the same calendar week.

. . . .

No overtime as described in this section, can be paid unless it has been authorized by the authorized administrative authority.

The appointing authority of each agency may designate, with the approval of the director of administrative services, specific positions within his agency with a starting rate of not less than a rate equivalent to pay range 9, step 1, salary schedule A or pay range 29, step 2, salary schedule B [currently \$5.83 per hour or \$12,126.40 per year], the duties of which are professional, administrative, or executive in nature, and such positions shall be exempt from all the provisions of this section regarding overtime compensation.

The salary/wage provisions of R.C. 124.15 and the overtime pay provisions of R.C. 124.18 constitute the compensation authorized by R.C. Chapter 124 for purposes of R.C. 124.151. The "total compensation" limit of R.C. 124.151 is a function of these authorized sums plus a "supplementary compensation schedule." The exact nature of this additional sum is not entirely free from doubt. The fact that R.C. 124.15 sets up three salary "schedules" in tandem with the use of that same phrase in R.C. 124.151 strongly indicates that the "supplementary compensation schedule" (emphasis added) was intended to refer to additional salary. Arguably, it could refer also to additional overtime pay. Whether applied to salary and/or overtime pay, however, it is clear that the total compensation derived from salary and overtime may not exceed \$55,000 in any period of twelve consecutive months.

Because, as you have indicated, any payments to Departmental physicians over and above the \$55,000 ceiling would be for work in excess of 40 hours per week, it certainly appears that the excess payment would be a form of overtime pay. As such, it would be subject to the pay limitation stated in R.C. 124.151. As noted earlier, overtime pay is one of the components of compensation "authorized" by R.C. Chapter 124. Hence, it is part of the "total compensation" limited by R.C. 124.151. The fact that the overtime pay is not denominated as such would not change its true character. No matter what it is called, if the excess pay is in fact overtime pay, it is inexorably part of the mix of compensation components which falls within the \$55,000 "total compensation" ceiling.

Nor would my opinion differ if the excess compensation provided by "side" contracts or dual employment arrangements were intended to compensate for something other than work in excess of 40 hours per week. It is abundantly clear that the Department could not make direct salary and overtime payments to its physicians which exceeded the pay ceiling expressed in R.C. 124.151. The question is whether the Department may accomplish by indirection that which it cannot do directly. So phrased, the situation is not dissimilar from that which faced the Ohio Supreme Court in State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64 (1972).

In Christman an Ohio municipality wanted to build a natatorium but could not issue any more bonds because to do so would put the city in excess of constitutional

debt limitations. Hence, the city cast about for an arrangement which might be characterized as something other than a debt. Some enterprising business planner came up with a stratagem whereby the construction contractor would build the pool at its own expense and the city would "lease" it. The transaction would have obligated the city to make "lease" payments until the cost of the pool had been retired at which time title would be conveyed to the city. Looking to the substance of the transaction, the Supreme Court viewed the arrangement as an installment purchase masquerading as a lease and said this:

At the outset, it should be emphasized that this court examines this transaction, not for what it purports to be, but for what, in essence, it is. In short, this court looks through the form to the substance of the proposed transaction. "To view the matter otherwise would exalt form over substance and impair the integrity of our constitutional government." State, ex rel. Nevada Building Authority v. Hancock (Nev. 1970), 468 P. 2d 333, 337.

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The court concluded that the entire contract price is a present indebtedness of the city. The city has presently obligated itself to make future payments, and the Company has a present right to compel each succeeding administration to make those payments.

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That Section 11 of Article XII was designed to prevent this type of evasion of the debt limitation is clear from a reading of the Debates and Proceedings of the Constitutional Convention of 1912. The purpose of the amendment was not only to limit the dollar volume of the bonds which could be floated by a municipality, but also to place fiscal responsibility on its officials and to retain a modicum of fiscal control in the taxpayers.

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. . . This court cannot make constitutional limitations meaningless by judicial circumvention in order to assist the city in acquiring a needed recreation facility. Nor does this court pass upon the desirability of such a constitutional debt limitation. The court must apply the applicable constitutional provision, including the purpose for which it was created, as the court finds it. The court cannot close its eyes to the fact that the lease arrangement is nothing more than an installment purchase plan by the city to acquire a recreational facility, binding the city and its taxpayers irrevocably to a program of successive appropriations for a period of ten years. 31 Ohio St. 2d at 67-77.

Like the Supreme Court in Christman, I cannot close my eyes to either the substance of compensation arrangements which exceed \$55,000 per year per physician or the obvious purpose of the General Assembly in enacting pay ceilings. R.C. 124.151 says about as clearly as it could be said that a physician employed by the Department of Mental Health and Mental Retardation is not to be paid in the aggregate more than \$55,000 per year. If this statute may be circumvented by contractual and dual employment devices then there is no pay ceiling for these physicians. Conceivably, physicians in the Department of Mental Health and Mental Retardation could be paid \$155,000 annually pursuant to such arrangements. In short, "the sky's the limit" if the ceiling established by those statutes may be so easily skirted. It simply defies logic to think that that is what the legislature intended.

The untoward result of the proposed procedures can be demonstrated by any number of hypothetical fact situations. Suppose, for instance, that physician A spent all his time at one institution and was compensated by standard salary and overtime pay. Clearly, his maximum compensation could not exceed \$55,000. Next, assume that physician B provided services essentially identical to those

provided by A and worked exactly the same number of hours. However, instead of being paid pursuant to the standard procedures, he split his time between two institutions and had a "side" contract with the Department. In short, B provided identical services for an identical number of hours. Can it rationally be said that the pay of A must be limited to \$55,000 but "the sky's the limit" for B? To countenance such transparent devices would be to open the door to all forms of abuse and would, in fact, emasculate the statute in question.

Just as the court in Christman, supra, held that constitutional debt limitations could not be ignored in order to assist the city in achieving a laudable end, I am unable to ignore the clear statutory provisions of R.C. 124.151 in order to suggest that the Department of Mental Health and Mental Retardation may pay physicians higher salaries. I am not unaware that the Department is at a disadvantage in attracting physicians due to rather dramatic disparities in authorized pay levels among the various states. However, if it is necessary to pay physicians higher salaries in order to attract them to the employ of the Department, legislative action must be taken to authorize the payment of such salaries. There is no choice but to rely upon the wisdom of the legislature to identify, prioritize, and solve perceived problems of this nature.

For the reasons set forth above, I am constrained to conclude that the Department of Mental Health and Mental Retardation may not pay a physician in excess of fifty-five thousand dollars per year for performing the functions of a classification title requiring a licensed physician, regardless of the number of positions the physician holds.

Therefore, in specific answer to your questions, it is my opinion, and you are hereby advised, that:

1. The "total salary" limitation of fifty-five thousand dollars set forth in R.C. 141.01 applies on a calendar-year basis. The "total compensation" limitation of fifty-five thousand dollars applicable under R.C. 124.151 to licensed physicians employed by the Department of Mental Health and Mental Retardation applies on the basis of any twelve consecutive months.
2. The fifty-five thousand dollar per year maximum set forth in R.C. 124.151 is the maximum amount which the Department of Mental Health and Mental Retardation may pay a physician for performing the functions of a classification title requiring a licensed physician, regardless of the number of positions filled by the physician while performing those functions.