

OPINION NO. 86-046**Syllabus:**

The 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.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 25, 1986

I have before me your request for my opinion regarding several issues that have arisen in connection with audits of the Ohio State University and the University of Cincinnati colleges of medicine currently being conducted by your office. In your request you have asked me to address the following questions:

1. To what extent, and under what circumstances, may a state university permit publicly-owned facilities to be used for the private practice of medicine by employees of the university, and what restrictions, controls, or limitations, if any, are required for such use to be permitted?
2. May a nonprofit corporation chartered pursuant to Chapter 1702, Revised Code, lawfully provide medical services either by contract with a state university or directly to private patients through physician-employees, or are such activities limited to a professional organization established pursuant to Chapter 1785, Revised Code?

I note initially that R.C. 117.10 describes the duties and obligations incumbent upon the office of Auditor of State. R.C. 117.10 states, in part, that, "[t]he auditor of state shall audit all public offices as provided in [R.C. Chapter 117]," and that he "may audit the accounts of private institutions, associations, boards, and corporations receiving public money for their use and may require of them annual reports in such form as he prescribes." See also R.C. 117.09 (the Auditor of State shall be the chief inspector and supervisor of public offices). As Attorney General, I am required by R.C. 109.12 to provide legal advice to state officers and agencies in matters relating to the official duties of such officers and agencies. Having carefully reviewed your opinion request, I find that I am unable to consider your second question, insofar as the subject matter addressed therein does not appear to relate, in any significant way, to any of your duties as Auditor of State. Thus, I must respectfully decline rendering you an opinion on your second question.

Turning to your first question, I note that according to your request, a major focus of your examination has been the operation of various medical practice plans at the medical colleges of Ohio State University and the University of Cincinnati. By medical practice plans I understand you to refer to those agreements by which the Universities permit faculty members licensed to practice medicine to maintain and conduct their own medical practices on university property, utilizing university facilities and resources in conjunction therewith. In accordance with the existing terms of these medical practice plans, the faculty members agree, to varying extents, to remit to the Universities, either directly or as charitable contributions to private nonprofit, tax-exempt foundations, a percentage of income earned from their private medical practices.¹

¹ I have been provided a copy of a document entitled "The Ohio State University College of Medicine--Medical Practice Plan," which purports to be a statement of the policies currently incorporated in and made a part of the annual contract of employment between Ohio State University and all regular and auxiliary faculty members appointed in a division or department of the college of medicine. This particular plan states that it was adopted by the Board of Trustees of Ohio State University on June 7, 1985, to become fully effective on July 1, 1985, and may be amended only by formal action of the board of trustees. Section III of the plan addresses the compensation and support of regular faculty members. Section III(A) states that faculty members in the college of medicine are to receive a salary from the general funds budget of Ohio State University, and that the amount of such faculty member's salary shall be determined on an annual basis, based upon a recommendation made by the dean of the college of medicine. Section III(B) further states that, "[r]egular faculty members will be furnished with office and clinical facilities, equipment, supplies, and staff assistance, subject to the obligations of payment, provided in this Practice Plan," and Section III(C) also states that, again subject to the obligations detailed in the plan, "regular and auxiliary faculty members may establish their professional fees and bill for, collect, and retain all fees for services rendered by such faculty members."

In answering your question, I must examine initially the general authority and power of a state university and its board of trustees to hire, compensate, and contract with faculty members of the university, and to operate, maintain, and otherwise manage university property and facilities. R.C. Chapters 3335 and 3361 deal with Ohio State University and the University of Cincinnati respectively, and R.C. Chapter 3345 addresses the general powers of all state universities. The government of Ohio State University is vested in a board of nine trustees, who are appointed by the governor, with the advice and consent of the senate. R.C. 3335.02. The board of trustees of Ohio State University is vested with the right of suing and being sued, and of contracting and being contracted with. R.C. 3335.03; Sternberg v. Board of Trustees of Kent State University, 37 Ohio St. 2d 115, 308 N.E.2d 457 (1974) (a state university, as an instrumentality of the state, has the power to bind itself by contract); Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959). R.C. 3335.09 provides in pertinent part that the board of trustees "shall elect, fix the compensation of, and remove, the president and such number of professors, teachers, and other employees as are necessary." R.C. 3335.10 further provides that the board of trustees "shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly." See, e.g., Long v. Board of Trustees, 24 Ohio App. 261, 157 N.E. 395 (Franklin County 1926), appeal dismissed, 116 Ohio St. 738, 158 N.E. 7 (1927) (Ohio State University may, under powers conferred upon it by statute, establish and maintain a university bookstore). The board of trustees of Ohio State University is also empowered to establish and maintain a college of medicine. R.C. 3335.15(A).

The government of the University of Cincinnati is similarly vested in a board of nine trustees, which exercises powers

Section VIII of the plan describes the procedures to be followed in arriving at the annual charge to be paid by each regular faculty member for university medical facilities, equipment, supplies and staff assistance used by the faculty member to produce practice income. According to Section VIII(A), "each Department Chairperson will meet with each regular faculty member holding an appointment within that Department" for purposes of arriving at the annual charge. Section VIII(A) further provides that if a department chairperson and a faculty member cannot agree on the annual charge to be assessed the faculty member for his use of university medical facilities in generating practice income, then "the Chairperson shall, after consultation with the Department Finance Committee, recommend to the Practice Plan Committee the annual charges (supported by the list of facilities, equipment, supplies and staff assistance and percentage of use) and shall send a written copy of his recommendation to the regular faculty member involved in the dispute. Following consultation with the regular faculty member and the Department Finance Committee, the Practice Plan Committee shall determine the annual charges to be paid by the regular faculty member."

You have not indicated whether a similar written practice plan agreement exists between the University of Cincinnati and faculty members of its college of medicine.

similar to those conferred upon the board of trustees of Ohio State University. R.C. 3361.01. R.C. 3361.03 provides in pertinent part that the board of trustees of the University of Cincinnati "shall employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees, as may be deemed necessary," and further "shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university." R.C. 3361.04 also provides that the board of trustees of the University of Cincinnati "may make and enter into all contracts and agreements necessary or incidental to the acquisition of property for, or the operation of the university."

R.C. Chapter 3345 describes the powers of state universities in general. Ohio State University and the University of Cincinnati are state universities, and as such are instrumentalities of the state. R.C. 3345.011; Bailey v. Ohio State University, 487 F. Supp. 601 (S.D. Ohio 1980). The trustees of state universities are vested with broad powers. R.C. 3345.021 provides in part that, "[t]he board of trustees of any college or university, which receives any state funds in support thereof, shall have full power and authority on all matters relative to the administration of such college or university." See Long v. Board of Trustees, 24 Ohio App. at 264, 157 N.E. at 396 (the authority of a state university board of trustees is so sweeping that it is possessed of all powers incidental to the administration of the university unless expressly limited by statute); 1980 Op. Att'y Gen. No. 80-037 at 2-155; 1979 Op. Att'y Gen. No. 79-032 at 2-109; 1971 Op. Att'y Gen. No. 71-051 at 2-174. In addition, a number of provisions in R.C. Chapter 3345 describe a variety of specific powers conferred upon a state university and its board of trustees. See, e.g., R.C. 3345.01 (tuition may be charged nonresidents); R.C. 3345.022 (provision of legal services to students through a group legal services insurance plan); R.C. 3345.04 (designation of state university law enforcement officers); 3345.05 (disposition of fees); R.C. 3345.07 (acquisition, construction and maintenance of housing and dining facilities); R.C. 3345.11 (use of auxiliary facilities); R.C. 3345.16 (acceptance of donations and investment of endowment donations); R.C. 3345.18 (conveyance of university-owned lands); R.C. 3345.28 (establishment and administration of faculty improvement programs).

With respect to the use and management of auxiliary facilities by a state university or college, R.C. 3345.11 provides in part as follows:

Each state university or college may acquire, by purchase, lease, lease-purchase, lease with option to purchase, or otherwise, construct, equip, furnish, reconstruct, alter, enlarge, remodel, renovate, rehabilitate, improve, maintain, repair, and operate, and lease to or from others, auxiliary facilities, and may pay for the same out of available receipts of such state university or college. (Emphasis added).

As used in R.C. 3345.07, R.C. 3345.11, and R.C. 3345.12, the term "auxiliary facilities," is defined in part in R.C. 3345.12(A)(3) as follows:

"Auxiliary facilities" means ... hospitals, infirmaries and other medical and health facilities.

research, and continuing education facilities, and includes any one, part of, or any combination of the foregoing, and further includes site improvements, utilities, machinery, furnishings and any separate or connected buildings, structures, improvements, sites, utilities or equipment to be used in, or in connection with the operation or maintenance of, or supplementing or otherwise related to the services or facilities to be provided by, such auxiliary facilities. (Emphasis added).

Thus, it is apparent that under the pertinent statutory provisions in R.C. Chapters 3335, 3345, and 3361, the trustees of Ohio State University and the University of Cincinnati are vested with a broad range of powers relative to the employment of faculty members and the use and management of university property, including university hospitals, clinics, and other medical facilities. The trustees of Ohio State University and the University of Cincinnati are empowered to hire and fix the compensation of faculty members² and are authorized to negotiate and enter into contracts of employment with those faculty members. R.C. 3335.03; R.C. 3335.09; R.C. 3361.03; R.C. 3361.04. The latter authority, of necessity, includes the power to negotiate and set the terms and conditions of faculty members' employment contracts. See R.C. 3345.021; 1967 Op. Att'y Gen. No. 67-083 at 2-144 (R.C. 3335.08 and R.C. 3335.09 authorize the board of trustees of Ohio State University to set the conditions of employment of university personnel). The trustees also have broad, discretionary power to utilize and manage university property and auxiliary facilities, the latter including university hospitals, infirmaries and other medical and health facilities. R.C. 3335.10; R.C. 3345.11; R.C. 3345.12; R.C. 3361.04.

My review of the preceding statutes leads me to conclude that there are no statutory impediments to the trustees of Ohio State University and the University of Cincinnati permitting faculty members the use of university property and facilities in their own private medical practices, from which the faculty members derive practice income. In this regard the authority of the trustees is derived implicitly from their power to enter into contracts, R.C. 3335.03; R.C. 3361.03, utilize and manage university property in general and auxiliary medical facilities

² Several Attorney General opinions have discussed the extent of authority conferred upon trustees of state universities to fix the compensation of professors, teachers, and other university employees, and the nature of that compensation. See, e.g., 1978 Op. Att'y Gen. No. 78-049 (compensation as used in R.C. 3335.09 is not limited to direct cash payments, and may include other fringe benefits paid to an employee); 1973 Op. Att'y Gen. No. 73-020 (a professor or other state university employee may receive and accept honoraria for participating in seminars and lectures outside his normal teaching assignments without giving up any of his regular compensation); 1965 Op. Att'y Gen. No. 65-207 (pursuant to R.C. 3335.09 and analogous provisions throughout R.C. Title 33, the trustees of Ohio State University and other state colleges and universities have implied power to pay emeritus compensation to university employees as a supplemental retirement benefit).

in particular, R.C. 3335.10; R.C. 3345.11; R.C. 3345.12; R.C. 3361.04, and act on all matters relative to the administration of the university, R.C. 3345.021. In employing physicians to serve as faculty members in the Universities' colleges of medicine, it seems reasonable to infer that the trustees may negotiate, as a term and condition of the physicians' employment contracts, the use of university medical facilities by those physicians for their own private medical practices.³ As institutions of higher education, see R.C. 3345.011, Ohio State University and the University of Cincinnati have as their primary purpose the inculcation of higher learning. Neil v. Board of Trustees, 31 Ohio St. 15, 21 (1876) ("[t]he [Ohio Agricultural and Mechanical College, now Ohio State University] is a state institution, designed and well calculated to promote public educational interests"); 1972 Op. Att'y Gen. No. 72-023 at 2-94. This, undoubtedly, is also the purpose of the colleges of medicine of those two institutions, and the employment of physicians competent and experienced in their particular fields of medicine to serve as instructors within the colleges of medicine surely advances that purpose. It is, therefore, understandable that the Universities, motivated by a desire to attract and employ physicians who are well-qualified, competent, and preeminent in their individual areas of medical specialization, would offer to those physicians, as an incentive to become faculty members, the opportunity to maintain their own medical practices on university property, making available to them university facilities, personnel, and services in conjunction therewith. See generally 1973 Op. Att'y Gen. No. 73-020 at 2-69 (the practice of allowing professors at a state university to accept honoraria for engaging in seminars and lecture programs outside their normal teaching assignments at the universities, without forfeiting any of their regular compensation, is "intended to enhance the university's scholastic reputation, and may also enable it to attract the services of highly skilled professionals"); 1952 Op. Att'y Gen. No. 1126, p. 97 (in order to secure properly qualified physicians, nurses, and employees, a board of county hospital trustees may use funds appropriated for their use to pay advertising and travel expenses incurred in interviewing prospective employees). It is also appropriate that the university trustees negotiate such an arrangement with prospective faculty members as a part of the normal hiring process, pursuant to the trustees' power to enter into contracts and hire and fix the compensation of university employees. R.C. 3335.03; R.C. 3335.09; R.C. 3361.03; R.C. 3361.04. It would appear, therefore, that in pursuing such a course of action the university trustees are acting within the scope of their statutory authority.

In particular, the university trustees may appropriately characterize the utilization of university facilities, personnel, and services by the physicians in their private medical practices as a form of compensation, given in exchange for the various academic services the physicians provide as faculty members in the college of medicine. Such action on the

³ Insofar as the employment and compensation of faculty members is a matter related to the administration of the university, university trustees may delegate their power and authority in this regard to the president and other administrative officers of the university. R.C. 3345.021; 1972 Op. Att'y Gen. No. 72-023 at 2-94.

part of the trustees would be in keeping with their statutory authority to hire and set the compensation of university employees. R.C. 3335.09; R.C. 3361.03; 1978 Op. Att'y Gen. No. 78-049 at 2-115 ("[c]ompensation is not limited to direct cash payments to an employee...[and] [t]hus, it is of no moment whether employees are paid for their services through a weekly paycheck, fringe benefits, or a combination thereof"); 1973 Op. Att'y Gen. No. 73-038 (the trustees of a state university may authorize advance payment of compensation to university employees under annual employment contracts prior to the actual performance of contractual duties, provided such payment is reasonably incidental to the statutory purpose of the university). Cf. Laird v. Board of Trustees, 721 F.2d 529 (5th Cir. 1983) (state university policy of permitting university employed physicians to use university facilities in their private medical practices as a method of compensation does not violate equal protection clause of the fourteenth amendment with respect to other physicians in community who maintain private medical practices and are not employed by the university).

In exercising their discretion in this regard, however, the trustees should bear in mind the admonition that they must act within the bounds of their statutory authority and in a reasonable fashion, see generally Jewett v. Valley Railway Co., 34 Ohio St. 601 (1878) (where statutory authority to perform an act is granted, and there is no provision governing the manner in which the act is to be performed, the act may be performed in any reasonable manner), and that their decisions will be subject to judicial review for abuse of discretion should the propriety of those decisions be challenged, Hocking Valley Railway Co. v. Public Utilities Commission, 92 Ohio St. 362, 110 N.E. 952 (1915). See generally In Re Estate of Binder, 137 Ohio St. 26, 27 N.E.2d 939 (1940) (a trustee in a fiduciary relationship must act in accordance with the highest standards of integrity, with utmost good faith, and with scrupulous openness, fairness, and honesty). Thus, if the trustees decide to offer these physicians the use of university facilities, personnel, and services in their private medical practices as compensation in kind, they should be careful to ascertain precisely the actual value of such resources utilized by each physician to ensure that it fairly and reasonably approximates the value of the services rendered the University by each physician.

If the trustees determine that the value of university resources provided a particular physician exceeds the actual amount which the University desires to set as compensation for the physician, they must then require the physician to reimburse the University the amount of the excess.⁴ Failure

⁴ On the other hand, the trustees may decide that none of the various university resources utilized by the physicians in their private medical practices shall be characterized and intended as compensation in kind, in which case the trustees must require each physician to reimburse the University the full value of those resources. Such an arrangement is clearly within the statutory authority of the trustees. See R.C. 3345.11; R.C. 3345.12(A)(3). See also R.C. 3335.03; R.C. 3335.10; R.C. 3345.021; R.C. 3361.04. Further, the arrangement would not implicate the lending aid and credit provision of

to require reimbursement under such circumstances could implicate Ohio Const. art. VIII, §4, which prohibits the state from lending its aid and credit to private enterprises, and which prevents the state from gratuitously granting its resources to firms or individuals in the absence of some public purpose or consideration therefor. See generally 1985 Op. Att'y Gen. No. 85-047; 1952 Op. Att'y Gen. No. 1713, p. 559. Further, it is my understanding that currently, certain faculty members pay, as reimbursement for the use of university facilities, a portion of their private income to private nonprofit, tax-exempt foundations. All such sums remitted as reimbursement should be subject ultimately to the control and disposition of the University itself. By so providing, the trustees, in such a circumstance, should be able to alleviate any concern that they have acted imprudently or have otherwise abused their discretion by providing the physicians a consideration for which the University receives nothing in return.

Accordingly, it is my opinion, and you are hereby advised that the 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.

Ohio Const. art. VIII, §4, inasmuch as it would be analagous to a lease of university facilities, personnel, and services by the physicians, for which the amount of "rent" paid is equal to the value of those resources. See 1979 Op. Att'y Gen. No. 79-052.

Further, to the extent the trustees elect to characterize those resources as compensation in kind, the value thereof may be subject to inclusion, for purposes of federal income taxation, in the gross income of the physicians utilizing those resources. I.R.C. §61(a)(1)(gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items); Treas. Reg. §1.61-1(a) ("[g]ross income includes income realized in any form, whether in money, property, or services"); Commissioner v. Smith, 324 U.S. 177, 181 (1945). But cf. I.R.C. §132(a)(3) (gross income shall not include any fringe benefit which qualifies as a working condition fringe benefit, defined in I.R.C. §132(d) as "any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 [deduction for trade or business expenses] or 167 [deduction for depreciation]").