OPINION NO. 90-014

Syllabus:

1. For purposes of R.C. Chapter 124, an "employee" is any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer; the term "employee" does not include an officer who is appointed by the Governor to a post as an appointing authority or to a post on a commission, board, or body that has been granted appointing authority. (1981 Op. Att'y Gen. No. 81-049 and 1980 Op. Att'y Gen. No. 80-065 overruled to the extent that they are inconsistent with this opinion. 1973 Op. Att'y Gen. No. 73-104 reinstated to the extent that it is consistent with this opinion. 1988 Op. Att'y Gen. No. 88-022 and 1986 Op. Att'y Gen. No. 86-077 distinguished.)

2. Pursuant to R.C. 4117.02(A), a member of the State Employment Relations Board "during his period of service shall hold no other public office or public or private employment and shall allow no other responsibilities to interfere or conflict with his duties as a full-time board member." Within this limitation, the member is free to arrange his work responsibilities as he finds necessary to fulfill his responsibilities.

3. A member of the State Employment Relations Board is not an "employee" under R.C. 124.01(F).

4. A member of the State Employment Relations Board is duty-bound to devote to his job as much time as is required to perform his duties.

5. A member of the State Personnel Board of Review is prohibited from holding any other office of trust or profit under the government of the United States, the state or any political subdivision thereof, and from holding any other public office or public position of profit. Such a member may, however, hold a post in the private sector for which compensation is paid, provided that the duties of such post do not conflict or interfere with the individual's performance of his duties as a member of the Board.

To: David W. Sturtz, Inspector General, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 3, 1990

The Office of State Inspector General was established by Executive Order of the Governor, *see* Am. Exec. Order 88-27 (Sept. 26, 1988), for the purpose of examining, investigating, and making recommendations with respect to the prevention and detection of wrongful acts and omissions in the Governor's Office and the agencies of state government. In order to carry out such duties, you have requested an opinion on the following questions:

1. What constitutes full time employment for a member of the Ohio [Employment] Relations Board under 4117.02 O.R.C.[?]

2. What constitutes a position of profit in the context of 124.05 O.R.C. which states, "each member of the board shall devote his entire time to the duties of this office and shall hold no other position of profit"[?]

I consider first the issue of full-time employment for a member of the State Employment Relations Board (SERB). You have informed my staff that you are interested, in particular, in the question whether a member of SERB is required to work a standard forty-hour week.

R.C. 4117.02(A) creates SERB, provides for the appointment of its members by the Governor with the advice and consent of the Senate, and sets forth the following requirement: "A member of the board during his period of service shall hold no other public office or public or private employment and shall allow no other responsibilities to interfere or conflict with his duties as a full-time board member." Other divisions of R.C. 4117.02 and other sections of R.C. Chapter 4117 set forth the powers and duties of SERB. *See, e.g.*, R.C. 4117.02(C), (E)-(H); R.C. 4117.06; R.C. 4117.12(B)-(D). R.C. 4117.02(A) specifies that the Governor may remove any member of the board "upon notice and public hearing, for neglect of duty or malfeasance in office, but for no other cause." R.C. Chapter 4117 does not define the term "full-time board member," and no provisions of R.C. Chapter 4117 impose upon board members specific requirements regarding the time periods or amounts of time to be devoted to their duties.

Pursuant to R.C. 4117.02(D), compensation of members of SERB is in accordance with R.C. 124.15(J). R.C. 124.15(J) provides that, where no compensation is specifically provided by law, the Director of Administrative Services shall establish the rate and method of payment for members of boards and commissions pursuant to the pay schedules listed in R.C. 124.152. *See generally* 1 Ohio Admin. Code 123:1-7-23 (adopted under prior version of R.C. 124.15(J), rule 123:1-7-23 establishes the classifications of "Board/Commission Member 1" through "Board/Commission Member 4" and assigns each such classification to a pay range listed in R.C. 124.15). The pay schedules listed in R.C. 124.152 set forth compensation on both an hourly basis and an annual basis; the annual amount is computed on the basis of fifty-two weeks a year and a forty-hour workweek.

The standard definition of "officer" is set forth in *State ex rel. Landis v. Board of Commissioners*, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917), as follows:

> The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him....The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If 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.
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> ....

> ...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

See also, e.g., State ex rel. Milburn v. Pethtel, 153 Ohio St. 1, 90 N.E.2d 686 (1950); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943); 1985 Op. Att'y Gen. No. 85-036; 1971 Op. Att'y Gen. No. 71-071; 1963 Op. Att'y Gen. No. 3548, p. 58.

Under this definition, it appears that members of SERB are officers, rather than employees. Members of SERB are appointed to six-year terms and are subject to removal only for neglect of duty or malfeasance in office. R.C. 4117.02(A). Their posts[1] are referred to as "offices." R.C. 4117.02(A). SERB has power to hire employees; conduct investigations, hearings, elections, and other proceedings; adopt rules governing its proceedings and persons who practice before it; and certify certain final orders to the appropriate court of appeals. R.C. 4117.02. SERB is directed by statute to decide, in each case involving public employees, "the unit appropriate for the purposes of collective bargaining," and such determinations are "final and conclusive and not appealable to the court." R.C. 4117.06(A). SERB also is responsible for investigating charges of unfair labor practices, conducting hearings, and issuing orders. R.C. 4117.12. It is, thus, clear that members of SERB have official duties that are prescribed by statute and involve the exercise of independent governmental functions. It follows that a person who serves as a member of SERB is an "officer," as that term is used in its traditional sense to refer to a person who exercises part of the sovereignty of the state.

The traditional definition of "officer" carries with it the concept that the officer is duty-bound to devote the time necessary to discharge the duties of his office, whether that requires more or less than a standard forty-hour workweek, but that he is not otherwise restricted to a particular work schedule. *See* 1980 Op. Att'y Gen. No. 80-065; 1963 Op. No. 3548. Absent statutory provisions to the contrary, the right of an officer to compensation is attached to the office itself, as an incident of title to the office, and is not dependent upon the performance of the duties of the office. *See State ex rel. Wilcox v. Woldman*, 157 Ohio St. 264, 105 N.E.2d 44 (1952); *State ex rel. Clinger v. White*, 143 Ohio St. 175, 54 N.E.2d 308 (1944). An officer who fails to perform his duties may be subject to removal from office. Whether a particular officer is devoting sufficient time to his job to be able to fulfill his responsibilities is a question of fact to be determined on a case-by-case basis.

An officer is not required to devote particular hours to his duties. He may, instead, schedule his work as he finds necessary to fulfill his responsibilities. In the performance of his duties, an officer will frequently work more than a standard forty-hour workweek. He is, correspondingly, permitted to be absent during what would be considered normal business hours for such reasons as illness or personal business. *See State ex rel. Clinger v. White*; Op. No. 80-065; 1963 Op. No. 3548. The statutory requirement that an officer serve on a full-time basis has, thus, been construed to require that the officer devote the time that is necessary to discharge efficiently all the duties of the office, whether that is more or less than forty hours in a particular week. *See* Op. No. 80-065; 1963 Op. No. 3548.

The following provisions of R.C. 124.01 are relevant to the question you have raised:

> As used in Chapter 124. of the Revised Code:
> (A) "Civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof.

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[1] For purposes of this opinion, the word "post" is used in a general sense to include any sort of job, whether an office, position, or employment.

> (B) "State service" includes all such offices and positions in the service of the state, the counties, and general health districts thereof, except the cities, city health districts, and city school districts.
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> (D) "Appointing authority" means the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution.
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> (F) "Employee" means any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.

R.C. 124.18 establishes forty hours as "the standard work week for all employees whose salary or wage is paid in whole or in part by the state." Various provisions of R.C. Chapter 124 establish vacation, sick leave, and other benefits for state employees. It has been stated that any officer who is appointed to his office is an "employee" for purposes of R.C. Chapter 124, because he comes within the definition appearing in R.C. 124.01(F). *See, e.g.*, 1981 Op. Att'y Gen. No. 81-049; Op. No. 80-065. If this proposition is accepted, then a member of SERB is an employee for purposes of R.C. Chapter 124 and must comply with the forty-hour workweek requirement of R.C. 124.18, subject to any provisions governing vacation, sick leave, or other benefits that entitle the member to compensation for periods during which he does not work and subject to any applicable overtime provisions. *See generally* 1963 Op. No. 3548.

It appears, however, that the line categorizing all appointed officers as employees for purposes of R.C. Chapter 124 may have been too broadly drawn. R.C. 124.01 contains various provisions defining the terms used in R.C. Chapter 124. The terms "offices" and "positions" are used throughout those definitions. For example, "civil service" and "state service" are defined to include all "offices and positions" of trust or employment in the service of various entities. R.C. 124.01(A), (B). It appears, therefore, that "office" and "position" are not synonymous as used in R.C. 124.01. *See, e.g., Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 158 N.E. 81 (1927) (where different words are used, it is presumed that different meanings are intended).

The definition of "employee" appearing in R.C. 124.01(F) indicates that it applies to a person who holds a "position," in contrast with a person who holds an "office." *See* R.C. 124.01(A), (B). While the term "officer" is not defined, the use of that term in R.C. 124.01(D) suggests that a person with the power of appointment to, or removal from, a position in an office, department, commission, board, or institution is an officer, whether he holds such power by himself or as a member of a commission, board, or body. It should be noted that R.C. 124.01(D) speaks of appointment to "positions in" any office, department, commission, board, or institution. The posts held by the members of a commission or board are "on" the commission or board; board members are officers who constitute the board, rather than simply holding positions in the commission or board. The posts held by board members are, accordingly, "offices," rather than positions.

The definition of "employee" currently appearing in R.C. 124.01(F) and the contrasting usage of "offices" and "positions" in definitions relating to civil service have long been part of Ohio law. *See, e.g.*, G.C. 486-1; 1914-1915 Ohio Laws 400. With few exceptions,[2] those provisions have been read as excluding from the term

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[2] In certain instances, the term "employee" has been expressly used to include officers. For example, R.C. 124.81 authorizes the Department of Administrative Services, in consultation with the Superintendent of Insurance, to contract for insurance "covering all state employees who are paid directly by warrant of the state auditor, including elected state officials." *See also* 1977 Op. Att'y Gen. No. 77-095; 1975 Op. Att'y Gen. No. 75-061. The terms "employ" and "employee" are given varied meanings throughout the Revised Code. *See, e.g.*, R.C. 9.44 ("a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have his prior

"employee" both elected officers and certain appointed officials. *See, e.g.*, 1974 Op. Att'y Gen. No. 74-021 (classifying the Chief of the Division of Mines as an officer, rather than an employee, for purposes of payment for unused sick leave and vacation leave); 1973 Op. Att'y Gen. No. 73-104; 1963 Op. No. 3548 at 66 ("I am reluctant to conclude that the legislature ever intended that state officers should be governed by [the forty-hour workweek or overtime provisions]"); 1963 Op. Att'y Gen. No. 20, p. 102; 1963 Op. Att'y Gen. No. 56, p. 128; 1962 Op. Att'y Gen. No. 3239, p. 667; 1961 Op. Att'y Gen. No. 2202, p. 238 at 240 ("while as to state employees forty hours is the standard work week..., there is no similar provision as to state *officers*"); 1960 Op. Att'y Gen. No. 1124, p. 67; 1933 Op. Att'y Gen. No. 896, vol. I, p. 815 at 818 ("[n]either...do the terms...with reference to eight hours of daily service in the several departments apply to these [appointed] officers for the reason that the statute applies to [employees] only, rather than officers in the several departments").

In Op. No. 80-065, one of my predecessors disregarded the established interpretation of R.C. 124.01 and concluded, instead, that, under the definition of "employee" appearing in R.C. 124.01, any person who is appointed to his post is an "employee," even though that person may be an officer for other purposes. Op. No. 80-065 applied that interpretation to the sick leave provisions appearing in R.C. Chapter 124 and found that the Registrar of Motor Vehicles, deputy inspectors, and the Deputy Auditor – because they hold appointed posts – are employees for purposes of R.C. Chapter 124 and come within the sick leave provisions contained in that chapter. Op. No. 81-049 adopted the analysis set forth in Op. No. 80-065 and applied it to the provisions dealing with payment of unused sick leave upon retirement, finding that the director of an administrative department created pursuant to R.C. 121.02 – because he holds an appointed post – is an "employee" for purposes of R.C. Chapter 124 and comes within provisions of that chapter providing for the payment of unused sick leave upon retirement.[3]

The analysis set forth in Op. No. 80-065 failed to consider the usage of the terms "office" and "position" in R.C. 124.01. The conclusion reached in Op. No. 81-049 disregarded the generally-established interpretation of R.C. 124.01. *See*

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service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of his vacation leave"). *See generally* 1979 Op. Att'y Gen. No. 79-084 at 2-269 (discussing the meaning of "officer" and "employee") (questioned on other grounds in 1987 Op. Att'y Gen. No. 87-102).

[3] A similar interpretation of R.C. 124.01(F) has been cited or applied in subsequent opinions. 1988 Op. Att'y Gen. No. 88-022, at 2-81 n. 2, cited 1981 Op. Att'y Gen. No. 81-049 for the proposition that directors of administrative departments created pursuant to R.C. 121.02 are "employees" under R.C. 124.01(F), even though they may otherwise be classified as public officers. Op. No. 88-022 contains a compatibility analysis which does not turn on this distinction. 1986 Op. Att'y Gen. No. 86-077 found that members of a board of elections were employees for purposes of R.C. Chapter 124 because they were appointed, and subject to removal, by the Secretary of State. Op. No. 86-077 concluded that the members were, for various reasons, not entitled to the fringe benefits at issue; therefore, the question whether they were employees under R.C. 124.01 was not essential to the conclusions reached in that opinion. Op. No. 88-022 is distinguishable from the other authorities considered in this opinion because its analysis does not relate to the definition of "employee" under R.C. 124.01. Op. No. 86-077 is distinguishable from the other authorities considered in this opinion because it concerns an individual who is appointed by the Secretary of State, rather than by the Governor, and because its consideration of "employee" under R.C. 124.01 was not essential to its conclusions. *See also* 1981 Op. Att'y Gen. No. 81-046, at 2-182 n. 5 (citing 1980 Op. Att'y Gen. No. 80-065 for the general proposition that "whether a particular person is viewed as an 'officer' or an 'employee' may depend upon the context in which those terms are used").

1963 Op. No. 3548 at 62 ("I do not...believe that a state officer is an employee within [the definition of "employee" then appearing in R.C. 143.01, predecessor to R.C. 124.01] as I construe the reference to 'appointing officer' to mean the appointing officer of a particular office, department, commission, board, or institution, and not to include the governor as an appointing authority with reference to the appointment of directors of departments"). I disagree with the conclusion that every person who is appointed to his post is an "employee" for purposes of R.C. Chapter 124. *But see* note 2, *supra*. I conclude, instead, that the term "employee," as used in R.C. 124.01, does not include an officer who is appointed by the Governor to a post as an appointing authority or to a post on a commission, board, or body that has been granted appointing authority.[4] This is the interpretation that was set forth in 1963 Op. No. 3548 and has been supported by longstanding practical application.

> 1963 Op. No. 3548 defined the elements of a public office as follows:
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> (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. No. 3548 at 61. That opinion concluded that the Director of Finance – an officer appointed by the Governor – was not subject to the vacation provisions then appearing in R.C. 121.161, but that he could take whatever time he deemed proper as vacation. As a corollary, the officer was not entitled to compensation for earned but unused vacation leave. *See also* 1963 Op. No. 56 at 135 (agreeing with 1963 Op. No. 3548 that vacation benefits were "not intended to apply to state officers"). 1963 Op. No. 3548 concluded, similarly, that such an appointed officer was not subject to the forty-hour workweek then required of state employees by R.C. 143.11. The established interpretation of provisions governing sick leave, vacation leave, and workweek requirements was, thus, that an appointed officer was not restricted by standard workweek requirements and did not receive corresponding benefits. Rather, he was duty-bound to devote to his duties the time required for their performance, whether that time was more or less than the standard workweek.[5] The definition of "appointed officer" used in this interpretation was an officer who served independently and was not subject to the direction and control of a superior officer. I find that this definition, together with the language of R.C. 124.01, supports the conclusion that the term "employee," as used in R.C. 124.01, excludes appointed officers when the officers are appointed by the Governor and have appointing authority over the particular office, department, commission, board, or institution that they serve.

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[4] It is clear that the term "employee," as used in R.C. 124.01, excludes all elected officers, *see* R.C. 124.01(F), and this opinion concludes that it excludes officers appointed by the Governor who are themselves appointing authorities. It is possible that such term may also exclude officers other than those discussed in this opinion. For purposes of this opinion, I am considering individuals who are appointed by the Governor to serve as members of state boards, commissions, or bodies that have the power of appointment or to serve in other posts (*e.g.*, as the director of a state department) that are appointing authorities. This opinion does not address individuals who are appointed to their posts by persons other than the Governor. *See generally* note 3, *supra*.

[5] 1981 Op. Att'y Gen. No. 81-049 overruled 1973 Op. Att'y Gen. No. 73-104, which set forth the proposition that a person who was appointed to a state board was a public officer who did not lose any right to his salary by reason of occasional absences, but who was not, as an officer, entitled to sick leave benefits granted to employees. I am not reconsidering the specific questions addressed in Op. No. 73-104, but I affirm its discussion of public officers and I hereby reinstate Op. No. 73-104 to the extent that it is consistent with this opinion.

It follows that a person holding a post by virtue of appointment by the Governor is not necessarily an "employee" for purposes of R.C. Chapter 124.01. It is, rather, necessary to determine whether the post is an office for purposes of R.C. 124.01, or whether it is merely a position, and also whether the post has been granted appointing authority. As discussed above, a member of SERB is appointed by the Governor, *see* R.C. 4117.02, and has statutory duties that involve the exercise of independent governmental functions, *see, e.g.*, R.C. 4117.06, .12. A member of SERB thus exercises part of the sovereignty of the state and is an officer in the traditional sense. Further, SERB has the power of appointment to positions in the employment of the Board. *See* R.C. 4117.02(E) ("[t]he board shall appoint an executive director and attorneys, attorney-trial examiners, mediators, arbitrators, members of fact-finding panels, directors for local areas, and other employees as it finds necessary for the proper performance of its duties..."). It follows that a member of SERB is an officer, rather than an employee, for purposes of R.C. Chapter 124. As a result, a SERB member is not subject to the provisions of R.C. 124.18 that establish forty hours as the standard workweek for employees paid by the state.

I conclude, therefore, that a member of SERB "during his period of service shall hold no other public office or public or private employment and shall allow no other responsibilities to interfere or conflict with his duties as a full-time board member." R.C. 4117.02(A). Within this limitation, the member is free to arrange his work responsibilities as he finds necessary to fulfill his responsibilities. A SERB member is not obligated to follow a particular schedule. Rather, he is subject to the common law principle governing officers – that an officer is duty-bound to devote to his job whatever amount of time is necessary to perform his duties, even if this requires more than forty hours.[6]

It is true that a member of SERB is described by statute as "a full-time board member." R.C. 4117.02(A). That term is, however, used in connection with provisions prohibiting conflicting responsibilities and does not provide a firm indication of the number of hours that are necessary to perform the job. *See* R.C. 4117.02(A). The following appears in 1963 Op. No. 3548, at 65:

> I might note that I am aware of the provision of Section 121.12, Revised Code, stating that each appointed state officer shall devote his entire time to the duties of his office. I do not believe, however, that this provision relegates state officers to the forty-hour week required of state employees by Section 143.11, Revised Code [now R.C. 124.18]. Nor do I believe that this would entitle state officers to compensation or compensatory time off for service in excess of forty hours as is granted to employees by that section.

Both 1963 Op. No. 3548 and 1961 Op. No. 2202 cite 1959 Informal Opinion No. 22 (April 16, 1959). 1961 Op. No. 2202, at 240, quotes 1959 Informal Op. No. 22 as follows:

> 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.
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> 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

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6 If a member of SERB failed to perform his duties, that member would be subject to removal pursuant to R.C. 4117.02(A), which states: "The governor may remove any member of the board, upon notice and public hearing, for neglect of duty or malfeasance in office, but for no other cause."

> 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.
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> There are, of course, some state officers whose duties are such that, like a commanding officer under military regulations, customs and usages, [they] 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....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. (Emphasis in original.)

I concur in this analysis of the duties of a full-time officer.

It is, further, clear that the compensation paid to a SERB member is based on a forty-hour workweek. *See* R.C. 124.15(J); R.C. 124.152; R.C. 4117.02(D). That is, however, merely the convention used for determining compensation and does not constitute a legal requirement that the SERB member work for precisely forty hours each week. *Cf.* R.C. 124.15(B) ("[t]he pay schedule of all employees shall be on a biweekly basis, with amounts computed on an hourly basis"); R.C. 124.18 (establishing a standard forty-hour workweek for "all employees whose salary or wage is paid in whole or in part by the state..."). *See generally* 1980 Op. Att'y Gen. No. 80-037.

I turn now to your second question, concerning the meaning of the term "position of profit" as used in R.C. 124.05. R.C. 124.05 provides that the State Personnel Board of Review (PBR) shall be composed of three members, appointed by the Governor with the advice and consent of the Senate. R.C. 124.03 sets forth the powers and duties of the PBR. R.C. 124.05 states that members of the PBR shall receive a salary fixed pursuant to R.C. 124.14, payable in the same manner as salaries of other state officers, and that they may be removed from office for cause as provided in R.C. 3.04.

Your question relates to the following restrictions that are imposed on PBR members:

> *No member of the board shall hold any other office of trust or profit under the government of the United States, the state or any political subdivision thereof.*
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> *Each member of the board shall devote his entire time to the duties of this office and shall hold no other office or position of profit.* Each member of the board shall receive a salary fixed pursuant to section 124.14 of the Revised Code, payable in the same manner as the salaries of other state officers, and shall be reimbursed for his actual expenses incurred in the performance of his official duties. (Emphasis added.)

R.C. 124.05. You have informed my staff that you are concerned, in particular, with the question whether the term "position of profit" includes jobs in the private sector, as well as public positions.

Your question arises in light of the fact that similar language appearing in R.C. 121.12 has been construed as prohibiting the holding of public positions, but not the holding of jobs in the private sector. R.C. 121.12 applies to department directors, assistant and deputy directors, and certain other officers within state departments, *see* R.C. 121.02, .04, .05, and states that each such officer "shall devote his entire time to the duties of his office, and shall hold no other office or position of profit." That language, read literally, suggests that the officer to whom

it applies may not hold any other post for which he receives compensation. While such an interpretation may, on occasion, have been given to that language, *see, e.g.*, 1931 Op. Att'y Gen. No. 3462, vol. II, p. 1019 (concluding that an officer subject to G.C. 154-16 [now R.C. 121.12] may not be employed as a teacher at the Ohio State University or any other college), Attorney General opinions in recent years have adopted the position that the prohibition does not extend to posts in the private sector. In 1988 Op. Att'y Gen. No. 88-022, I concluded that the Director of Health is not prohibited by R.C. 121.12 from holding a post as clinical associate professor of medicine in which he receives payment from a private corporation for the treatment of patients at a clinic. That conclusion is consistent with the following statement set forth in 1961 Op. No. 2202, at 241: "As to the words of [R.C. 121.12] 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."[7] This language apparently reflected a commonly-accepted statutory interpretation that had been in effect for some time. *See generally* 1933 Op. No. 896.

R.C. 124.05 contains two provisions that restrict the activities of PBR members. The first states that "[n]o member of the board shall hold any other office of trust or profit under the government of the United States, the state or any political subdivision thereof." This provision, with minor variations, has been part of the civil service law since 1913, when it applied to members of the State Civil Service Commission of Ohio, the forerunner of the PBR. *See* 1913 Ohio Laws 698, 699 (Am. S.B. 7, filed May 10, 1913) (enacting G.C. 486-3); *see also* 1914-1915 Ohio Laws 400 (Am. S.B. 3, filed June 1, 1915). It clearly prohibits a member of the PBR from holding any other public office. The second provision states that each member of the board "shall hold no other office or position of profit." This provision was enacted when the PBR was created. *See* 1959 Ohio Laws 1049, 1052 (Am. H.B. 794, eff. Nov. 2, 1959) (amending R.C. 143.02). It is part of the sentence requiring a board member to devote his entire time to the duties of the office and was evidently modeled on the language then appearing in R.C. 121.12. It is, accordingly, reasonable to conclude that the second provision was intended to carry with it the same interpretation that was given to the parallel language appearing in R.C. 121.12. *See, e.g.*, R.C. 1.42 ("[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly"); R.C. 1.49 ("[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained;...(D) The common law or former statutory provisions, including laws upon the same or similar subjects..."). It is, further, generally understood that this meaning has been ascribed to the language over the years by members of the PBR and has not been changed by the General Assembly or challenged through administrative practice. *See generally* R.C. 1.49(F); *In re Estate of Morgan*, 65 Ohio St. 2d 101, 419 N.E.2d 2 (1981); *State ex rel. Automobile Machine Co. v. Brown*, 121 Ohio St. 73, 166 N.E. 903 (1929); 1960 Op. Att'y Gen. No. 1926, p. 752; 1931 Op. Att'y Gen. No. 3486, vol. II, p. 1040 at 1042.

It appears, therefore, that the language of R.C. 124.05 prohibiting a PBR member from holding another "office or position of profit" should be construed as

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[7] I note that 1961 Op. Att'y Gen. No. 2202, p. 238 concluded that R.C. 121.12 did not preclude the Director of Health from teaching part time at a state university and being compensated by university funds. That opinion suggested that the post of instructor was a mere employment, rather than a "position" as that term is used in R.C. 121.12, and further concluded that even if it were a "position," it would not be the type of "position" that the legislature had in mind in the enactment of R.C. 121.12. *See also* 1988 Op. Att'y Gen. No. 88-022. For purposes of this opinion, I am considering your question as it addresses the issue of private employment by a member of the PBR. I am not considering to what extent R.C. 121.12 or R.C. 124.05 might permit an individual to hold certain other types of public employment – in particular, employment as a teacher at a state university who is paid by public funds or as an occasional speaker. *See generally* Op. No. 88-022; 1933 Op. Att'y Gen. No. 896, vol. I, p. 815.

referring only to an office or position of profit in government, and not to a post in the private sector. The interpretation of R.C. 124.05 that restricts the term "office or position of profit" to offices and positions with the government is consistent with the usage of the words "office" and "position" in R.C. 124.01 and the definitions contained therein. Those definitions, discussed above, are applicable throughout R.C. Chapter 124. *See* R.C. 124.01. *But see* note 2, *supra*.

It should be noted, further, that when the General Assembly has intended that an individual be prohibited from holding a private post, as well as another public post, it has clearly so stated. *See, e.g.,* R.C. 3304.14 ("[t]he administrator [appointed by the Rehabilitation Services Commission] shall devote his entire time to the duties of his office, shall hold no other office or position of trust and profit, and shall engage in no other business during his term of office"); R.C. 4117.02(A) ("[a] member of the [state employment relations] board during his period of service shall hold no other public office or public or private employment and shall allow no other responsibilities to interfere or conflict with his duties as a full-time board member"); R.C. 4911.04 ("[t]he consumers' counsel...during his term of office shall not hold any other office of either trust or profit under the government....The counsel shall not engage in any other occupation or business..."); 1960 Op. No. 1926, at 754 (quoting R.C. 2965.03, governing the Pardon and Parole Commission: "During his term of office, no member, shall hold any other office of trust or profit under the government of the United States, or of this state, or of any political subdivision thereof, or engage in any other occupation or employment"; R.C. 2965.03 has been repealed, *see* 1964 Ohio Laws, Special Session, 147, 371-73 (Am. Sub. H.B. 28, eff. March 18, 1965)). The absence of such language in R.C. 124.05 suggests that the General Assembly intended to prohibit only the holding of other public offices and positions, and not the undertaking of private business or employment. *But see* R.C. 4301.07 (stating expressly that "[e]ach member of the liquor control commission shall devote his entire time to the duties of his office and shall hold no other public position of trust or profit").

Even though a PBR member is permitted under R.C. 124.05 to engage in private employment, he remains subject to the portion of R.C. 124.05 providing that "[e]ach member of the board shall devote his entire time to the duties of this office." The requirement that an individual devote his "entire time" has been construed to mean that he is required to devote such time as is necessary to perform the duties of his office, and that he may not undertake activities that interfere with such obligation. *See, e.g.*, Op. No. 88-022; 1961 Op. No. 2202, at 240 (quoting 1959 Informal Op. No. 22); 1933 Op. No. 896, at 819 ("[t]he provisions...to the effect that the officers...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'" (quoting a letter of May 6, 1924, from C.C. Crabbe, Attorney General, to the Director of Education)). A PBR member is, accordingly, prohibited from undertaking any private employment that would interfere with the performance of his duties.

A PBR member is, similarly, prohibited from undertaking private employment that would create a conflict of interests with his position as member of the PBR. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-037; Op. No. 88-022; 1987 Op. Att'y Gen. No. 87-025. A PBR member is, of course, subject to applicable statutory provisions governing outside interests or employment. *See, e.g.*, R.C. 102.03-.04; R.C. 2921.42-.43.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. For purposes of R.C. Chapter 124, an "employee" is any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer; the term "employee" does not include an officer who is appointed by the Governor to a post as an appointing authority or to a post on a commission, board, or body that has been granted appointing authority. (1981 Op. Att'y Gen. No. 81-049 and 1980 Op. Att'y Gen. No. 80-065 overruled to the extent that they are inconsistent with this opinion. 1973 Op.

Att'y Gen. No. 73-104 reinstated to the extent that it is consistent with this opinion. 1988 Op. Att'y Gen. No. 88-022 and 1986 Op. Att'y Gen. No. 86-077 distinguished.)

2. Pursuant to R.C. 4117.02(A), a member of the State Employment Relations Board "during his period of service shall hold no other public office or public or private employment and shall allow no other responsibilities to interfere or conflict with his duties as a full-time board member." Within this limitation, the member is free to arrange his work responsibilities as he finds necessary to fulfill his responsibilities.

3. A member of the State Employment Relations Board is not an "employee" under R.C. 124.01(F).

4. A member of the State Employment Relations Board is duty-bound to devote to his job as much time as is required to perform his duties.

5. A member of the State Personnel Board of Review is prohibited from holding any other office of trust or profit under the government of the United States, the state or any political subdivision thereof, and from holding any other public office or public position of profit. Such a member may, however, hold a post in the private sector for which compensation is paid, provided that the duties of such post do not conflict or interfere with the individual's performance of his duties as a member of the Board.