

**OPINION NO. 2007-033****Syllabus:**

A judge of election is not an “employee” who is entitled to receive the state minimum wage rate under Ohio Const. art. II, § 34a.

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**To: Jennifer Brunner, Ohio Secretary of State, Columbus, Ohio**  
**By: Marc Dann, Attorney General, October 12, 2007**

You have asked whether judges of election are required to be paid the new state minimum wage that was adopted by Ohio voters in November 2006 as an amendment to the Ohio Constitution. We examine first the statutory provisions relating to the appointment, duties, and compensation of judges of election under R.C. Chapter 3501. We will then review the scope of the constitutional amendment, which leads us to an examination of the federal Fair Labor Standards Act and the regulations promulgated thereunder.

**I. Appointment and Compensation of Judges of Election  
under R.C. Chapter 3501**

Judges of election (commonly called poll workers, and variously referred to in statute as election officers, precinct election officials, precinct officials, and precinct officers) are appointed by the county board of elections for each election precinct in the county. R.C. 3501.22. They are appointed by September 15 of each year, and serve a one-year term. *Id.* See also R.C. 3501.27 (qualifications and training of judges of election). Judges of election are responsible for “receiving the ballots and supplies, opening and closing the polls, and overseeing the casting of ballots during the time the polls are open.” R.C. 3501.22. See also R.C. 3501.33; R.C. 3501.35(D). After the polls close, election judges must count the number of electors who voted, and the numbers of unused, soiled and defaced, and voted ballots; they must also count and tally the votes cast, and certify the results of the election to the board of elections. R.C. 3501.26; R.C. 3505.26-.31.

Judges of election are paid an hourly rate for their services at each general, primary, or special election.<sup>1</sup> R.C. 3501.28(A)(3), (C). The hourly rate may not be “less than the minimum hourly rate established by the Fair Labor Standards Act and not more than” an amount fixed as a per diem.<sup>2</sup> R.C. 3501.28(C). The Secretary of State must establish by rule “the maximum amount of per diem compensation that may be paid to judges of an election under this section each time the Fair Labor Standards Act is amended to increase the minimum hourly rate established by the act.” R.C. 3501.28(D). The new maximum per diem must be “increased by the same percentage that the minimum hourly rate has been increased under the act.” *Id.*<sup>3</sup>

<sup>1</sup> Elections may be held on the first Tuesday after the first Monday in the months of November, August, February, and May, except in presidential primary election years, when elections are held in November, August, and March. R.C. 3501.01(A)-(E). *See also* R.C. 3501.02. A municipal or county charter may, however, provide for holding a primary or special election on a day other than one of those days. R.C. 3501.01(D); R.C. 3501.02(E). *See also State ex rel. Rose v. Ryan*, 119 Ohio App. 363, 370, 200 N.E.2d 668 (Franklin County 1963) (a municipal charter can prescribe “the time of holding the municipal election, and the method, manner and procedure for conducting such elections”). In rare circumstances, an election may be held on a day other than on one of those days prescribed in R.C. 3501.01 or by charter. *See, e.g.,* R.C. 3521.03 (“[w]hen a vacancy in the office of representative to congress occurs, the governor ... shall issue a writ of election directing that a special election be held to fill such vacancy in the territory entitled to fill it on a day specified in the writ”).

<sup>2</sup> A county board of elections may increase the pay of a judge of an election during a calendar year if it has given written notice of the proposed increase to the board of county commissioners by no later than October 1 of the preceding calendar year. R.C. 3501.28(E)(1)(a). A board of elections may increase a judge’s pay during a calendar year by no more than nine per cent over the compensation paid the judge during the previous calendar year if the amount paid during the previous calendar year was eighty-five dollars or less per diem. R.C. 3501.28(E)(1)(b). If a judge of election was paid during the previous calendar year more than eighty-five dollars but less than ninety-five dollars, the board may increase the judge’s pay up to four and one-half percent. R.C. 3501.28(E)(1)(c). The board of elections and board of county commissioners may enter into a written agreement to permit an increase greater than the nine per cent or four and one-half per cent, respectively. R.C. 3501.28(E)(2).

<sup>3</sup> Until recently, the minimum wage rate was \$5.15 per hour under the Fair Labor Standards Act (FLSA). Pub. L. No. 104-188, § 2104, 110 Stat. 1755, 1928-29. The maximum per diem amount set by R.C. 3501.28(C) was \$95. As of July 24, 2007, the FLSA minimum wage rate increased from \$5.15 to \$5.85 per hour. Pub. L. 110-28, § 8102, 121 Stat. 112, 188 (codified as 29 U.S.C. § 206(a)). The Secretary of State is required by R.C. 3501.28(D) to increase the maximum per diem amount proportionately.

No judge who works less than the full election day may be paid the maximum per diem amount allowed under R.C. 3501.28, or the maximum amount set by the board of elections, *see* note 2, *supra*, whichever is less. R.C. 3501.28(F). A “full election day” is the time between the opening of the polls at 6:30 a.m. and completion of the counting, tallying, and sealing of ballots—these latter tasks can be performed, of course, only after the polls close, which is at 7:30 p.m., or later if voters are waiting in line. R.C. 3501.26; R.C. 3501.28(A)(2); R.C. 3501.32. Also, election officials are required to be at the polling place no later than one-half hour before the opening of the polls. R.C. 3501.31.

The presiding judge, who must deliver the election returns and supplies after the election to the board of elections, may be paid additional compensation “in an amount, consistent with [R.C. 3501.28], determined by the board of elections.” R.C. 3501.22(A). The presiding judge must also obtain the ballots, pollbooks, registration lists, and other material from the board of elections before election day and deliver the materials to the polling place on election day. R.C. 3501.31. For these services, he may receive five dollars per trip, plus mileage, in addition to the compensation provided under R.C. 3501.28. R.C. 3501.36.

## II. Minimum Wage Amendment, Ohio Const. art. II, § 34a

### A. Relationship between Ohio Const. art. II, § 34a and R.C. 3501.28

The new state minimum wage amendment, Ohio Const. art. II, § 34a, which was passed by the voters in November, 2006, required every “employer” to begin paying its “employees” a wage rate of not less than \$6.85 per hour, as of January 1, 2007. *See generally* 2007 Op. Att’y Gen. No. 2007-026. Ohio Const. art. II, § 34a (§ 34a or the Amendment) requires that the state minimum wage rate be adjusted each year, based on the rate of inflation (and without regard to the federal minimum wage).

The state minimum wage rate is, thus, currently greater than the federal minimum wage rate. *See* note 3, *supra*. If the Amendment applies to judges of election, R.C. 3501.28 would be unconstitutional since it sets a lower hourly rate than the Amendment, and because it imposes a maximum per diem amount that judges of election can earn, regardless of the number of hours they work. Statutes are presumed, however, to be constitutional. R.C. 1.47(A). *See State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723, 871 N.E.2d 547, at ¶6 (rejecting the argument that, the rule that statutes are presumed to be constitutional does not apply where the statute was enacted prior to voter approval of a constitutional amendment— “[w]e proceed with the presumption, notwithstanding the absence of any empirical data to support it, that the drafters of the proposed constitutional amendment and the voters who approved it knew of” the statute and its purpose). Ohio Const. art. II, § 34a did not explicitly repeal R.C. 3501.28, and to conclude that § 34a applies to judges of election would mean, in effect, that § 34a repealed R.C. 3501.28 by implication—however, “repeals by implication are disfavored as a matter of judicial policy.” *State v. Carswell* at ¶8. Thus, we work from the presumption that the Amendment does not apply to judges of election and has not implicitly repealed R.C. 3501.28.

### B. The meaning of “employee” under Ohio Const. art. II, § 34a

Under § 34a, the terms, “employer,” “employee,” and “employ” “have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that ‘employer’ shall also include the state and every political subdivision.” (Despite this implication to the contrary, the Fair Labor Standards Act (FLSA) does include the States and political subdivisions thereof as “employers” under the Act, as set forth below.) Thus, we must examine whether a judge of election is an “employee” under the FLSA, for purposes of determining whether she is an “employee” for purposes of § 34a.<sup>4</sup>

We emphasize that, merely because R.C. 3501.28 incorporates the minimum wage rate established under the FLSA as the minimum hourly rate to which judges of election are entitled does not mean necessarily that judges of election are covered as “employees” under the FLSA itself. To the contrary, this language in R.C. 3501.28 supports the argument that election judges are not covered under the FLSA, because, otherwise, such language would be unnecessary. *See* R.C. 1.47(B) (“[i]n enacting a statute, it is presumed that: The entire statute is intended to be effective”); *State v. Wilson*, 77 Ohio St. 3d 334, 336-37, 673 N.E.2d 1347 (1997) (“[i]n looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible”); *State ex rel. Cleveland Electric Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959) (“when language is inserted in a statute it is inserted to accomplish some definite purpose”). Also, a cap on the per diem amount a judge of election may earn, regardless of the number of hours worked, would be impermissible under the FLSA.

### III. The meaning of “employee” under the Fair Labor Standards Act

#### A. An “employee” does not include a volunteer, 29 U.S.C. § 203

An “employee” who is covered by the FLSA is “any individual employed by an employer,” 29 U.S.C.A. § 203(e)(1) (Supp. 2007), including “any individual employed by a State [or] political subdivision of a State.” 29 U.S.C.A. § 203(e)(2)(C) (West 1998). *See also* 29 U.S.C.A. § 203(c), (d), (x) (West 1998 and Supp. 2007) (including within the definition of an “employer,” a “public agency,” which includes “the government of a State or political subdivision thereof”); 29 U.S.C. A. § 203(g) (West 1998) (defining the term, “employ,” as “to suffer or permit to work”). In 1985, § 203 was amended<sup>5</sup> to explicitly exclude from the definition of “employee,” “any individual who volunteers to perform services for a public agency which is a State [or] a political subdivision of a State.” 29 U.S.C.A.

<sup>4</sup> The legislation implementing Ohio Const. art. II, § 34a, Am. Sub. H.B. 690, 126th Gen. A. (2006) (eff. April 4, 2007), will be discussed at note, *infra*, since it is helpful to have an understanding of what the FLSA and the regulations promulgated thereunder provide before examining Am. Sub. H.B. 690.

<sup>5</sup> *See* Pub. L. 99-150, § 4, 99 Stat. 787, 790.

§ 203(e)(4)(A) (West 1998).<sup>6</sup> In order to be considered a “volunteer” under the FLSA, a worker may receive no compensation, but may be paid “expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered.” 29 U.S.C.A. § 203(e)(4)(A)(i) (West 1998).<sup>7</sup>

#### **B. FLSA Regulations, 29 C.F.R. §§ 553.100 through 553.106**

In 1987, the Administrator of the Wage and Hour Division of the U.S. Department of Labor (Administrator) promulgated regulations, 29 C.F.R.

<sup>6</sup> Prior to the amendment of § 203 explicitly exempting volunteers for public agencies from the FLSA, the U.S. Supreme Court had held that volunteers were not “employees” covered by the Act. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (*Alamo Foundation*). The Court worked with no statutory or regulatory definition of “volunteer,” but looked at whether certain workers engaged in the commercial activities of a religious foundation were “employed by,” or “employees of,” the organization. Relying on standards developed in earlier FLSA cases for distinguishing between employees and trainees, and between employees and independent contractors, the Court stated that, “[t]he test of employment under the Act is one of ‘economic reality,’” and found that the workers at issue were employees, because they were “‘entirely dependent upon the Foundation for long periods, in some cases several years.’” 471 U.S. at 301. Elsewhere in the opinion, the Court contrasted to these employees a worker “‘who, ‘without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit,’ [and was] outside the sweep of the Act.’” 471 U.S. at 295.

Because, in *Alamo Foundation*, the Court was not working with the definition of “volunteer” found at 29 U.S.C. § 203 and in the Department of Labor’s regulations, 29 C.F.R. §§ 553.100-.106, discussed below, the case may be of limited assistance. See *Rodriguez v. Township of Holiday Lakes*, 866 F. Supp. 1012, 1019, n. 4 (S.D. Texas 1994) (the “‘definition of ‘volunteer’ in § 553.101(a) would thus seem to be the language binding on this Court,” since the “‘definition of ‘volunteer’ provided by the Supreme Court in *Tony & Susan Alamo Foundation* ... was formulated prior to the Administrator’s regulation in 1987”). We will, however, bring *Alamo Foundation* into our analysis to the extent it is relevant. See *Cleveland v. City of Elmendorf*, 388 F.3d 522, 527 (5th Cir. 2004) (because the definition of volunteer in *Alamo Foundation* “‘preceded the regulation’s promulgation, it is useful in understanding the intended scope of the regulation’”; see also notes 13 and 14, *infra*). (We note, however, that if *Alamo Foundation* had been decided subsequent to the inclusion of “volunteer” in § 203(e)(4)(A) as an exception to coverage under the Act, the exception would not have applied in that case because the employer was not a public agency.)

<sup>7</sup> Furthermore, the services performed by the worker may not be “the same type of services which the individual is employed to perform for such public agency.” 29 U.S.C. § 203(e)(4)(A)(ii) (West 1998). We assume that judges of election are not otherwise employed by the Secretary of State or a county board of elections.

§§ 553.100-.106 (2007),<sup>8</sup> to further explicate who constitutes a “volunteer” under 29 U.S.C. § 203(e)(4).<sup>9</sup> Section 553.101(a) reads, in pertinent part: “An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.”<sup>10</sup> Section 553.104(a) similarly provides that:

Individuals who are not employed in any capacity by State or local government agencies often donate hours of service to a public agency for civic or humanitarian reasons. Such individuals are considered volunteers and not employees of such public agencies if their hours of service are provided with no promise, expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106. There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies.

The impact that the receipt of expenses, benefits, or fees will have on the status of an individual as a “volunteer” is explained in 29 C.F.R. § 553.106:

<sup>8</sup> See 52 Fed. Reg. 2012 (Jan. 16, 1987).

<sup>9</sup> Am. Sub. H.B. 690, the legislation implementing Ohio Const. art. II, § 34a, provides that the term “employee” does not include persons “who are excluded from the definition of ‘employee’ under 29 U.S.C. 203(e).” R.C. 4111.14(B)(1). It also states that “employ” and “employee” “do not include any person acting as a ‘volunteer,’” which has the same meaning as in 29 C.F.R. §§ 553.101 to 553.106. R.C. 4111.14(B)(2). “[D]ue consideration and great weight shall be given to the United States department of labor’s and federal courts’ interpretations of the term ‘volunteer’ under the Fair Labor Standards Act and its regulations.” *Id.* Am. Sub. H.B. 690 is thus consistent with, and further delineates, the analysis of who constitutes an “employee” that is dictated by § 34a.

<sup>10</sup> Section 553.101 further states:

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to “volunteer” their services.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) An individual who performs hours of service as a volunteer for a public agency *may receive payment for expenses without being deemed an employee for purposes of the FLSA....* Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.

.....

(d) Individuals *do not lose their volunteer status if they are provided reasonable benefits* by a public agency for whom they perform volunteer services. *Benefits would be considered reasonable*, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or *pension plans* or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section.

(e) Individuals *do not lose their volunteer status if they receive a nominal fee* from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity.... The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

(f) Whether the furnishing of expenses, benefits, or fees would result in individuals losing their status as volunteers under the FLSA *can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.*

(Emphasis added.)

#### **IV. Analysis and Application of Federal Regulations to Judges of Election**

We turn now to "the United States department of labor's and federal courts' interpretation of the term 'volunteer' under the Fair Labor Standards Act and its

regulations,” which we must give “due consideration and great weight.” Am. Sub. H.B. 690, 126th Gen. A. (2006) (eff. April 4, 2007), note 9, *supra*.<sup>11</sup>

At least one federal court of appeals has addressed the status of election officers, finding them to be “volunteers” under 29 U.S.C. § 203(e)(4)(A) and 29 C.F.R. §§ 553.101 and 553.106, and thus not covered by the FLSA. In *Evers v. Tart*, 48 F.3d 319, 320-21 (8th Cir. 1995), the court stated:

[P]oll workers received the sum of \$35.00 per day for service as election clerks and \$50.00 per day for service as election judges. Election judges, in addition to the \$50.00, receive \$ .25 per mile for travel reimbursement. [They] have worked from as few as no days during the year to eight days during the year, depending on the number of elections held in a given year. Poll workers do not apply for their jobs, nor do they receive vacation or sick leave benefits, or other benefits normally given to county employees.

Based on the foregoing, we conclude that the [poll workers] are “volunteers” within the meaning of the FLSA, and therefore, are exempt from the minimum wage provisions of the Act.

Although the court in *Evers* did not separately analyze each of the pertinent federal regulations, as applied to election judges, we reach the same conclusion by doing so. Application of the regulations can be broken down, for our purposes, into two areas of inquiry: the election judges’ motivation for working at the polls, and whether the payments they receive are “compensation” (making them employees) or a “nominal fee” (which volunteers may receive).

#### A. The Motivation to Serve as Judges of Election

Both 29 C.F.R. §§ 553.101(a) and 553.104(a) define a “volunteer” in terms of a person who performs hours of service for civic, charitable, or humanitarian reasons. By thus defining or describing a “volunteer” in terms of a person’s reason for performing service for a public agency, the regulations inject an element of subjective intent or motivation into the analysis of whether that person is a volunteer or an employee. The courts, however, have differed in the significance they have attributed to such personal motivations.

In *Rodriguez v. Township of Holiday Lakes*, 866 F. Supp. 1012 (S.D. Texas 1994), the court noted that the “plain language of 29 C.F.R. § 553.101(a) clearly suggests that motivation is a factor in determining an individual’s volunteer status.”

<sup>11</sup> The Department of Labor has explicitly declined, however, to take a position on the precise issue at hand. Section 10b.33 of its “Field Operations Handbook” (Oct. 20, 1993) states that the Wage and Hour Division “will take no position as to whether persons employed by a public agency, such as a Board of Elections or similar office, to serve as election judges and officials on elections days are employees of the public agency and covered by the Act.” [https://www.dol.gov/esa/whd/FOH/FOH\\_Ch10.pdf](https://www.dol.gov/esa/whd/FOH/FOH_Ch10.pdf)

866 F. Supp. at 1019. “In addition, § 553.104(b) ... is explicitly made subject to the provision that services are performed on a volunteer basis only ‘when so motivated.’” *Id.* In *Todaro v. Township of Union*, 40 F. Supp. 2d 226 (D.N.J. 1999), however, the court criticized § 553.101(a) because it “fails to reflect the fact that a person who volunteers services may be motivated, either in whole or in part, by reasons of ‘personal purpose or pleasure’ ... that are other than ‘civic, charitable, or humanitarian,’” such as “to acquire employment contacts, gain experience, or obtain school credit.”<sup>12</sup> *Id.* at 230. The court found that the “regulatory definition does not require that the individual be exclusively, or even predominantly, motivated by ‘civic, charitable, or humanitarian reasons’; therefore, the Court understands this phrase to be modified by an implied ‘at least in part.’” *Id.* And, in *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004), the court found that “the determination of whether an individual is an employee or a volunteer under the FLSA is a question of law,” and “[c]onsequently, we do not indulge in an examination of the personal motivations behind the provision of services by each individual non-paid regular” (police officer).<sup>13</sup>

The courts have agreed, however, that the relevant inquiry in determining a worker’s motivation must be based on objective indicia and in light of the totality of circumstances. In *Todaro v. Township of Union*, the court aptly summarized the approach that has been taken by the federal courts in analyzing the meaning of “volunteer” and interpreting the federal regulations. Noting that the “regulatory definition ... incorporate[s] a standard of reasonableness,” the court explained that, the “definition of ‘volunteer’ must be applied in a common-sense way that takes into account the totality of the circumstances surrounding the relationship between the person providing services and the entity for which the services are provided, in light of the goals of the FLSA.... [and] the Court must rely upon an evaluation of the [workers’] statements, attitudes, and outward manifestations regarding their motivations, as well as any other available objective indicia that indicate whether a volunteer or employment relationship was contemplated by the parties.” 40 F. Supp. 2d at 230. *See also Cleveland v. City of Elmendorf*, 388 F.3d at 528 (finding that *Rodriguez* and *Todaro* “are not, in fact, inapposite,” because “[b]oth note that the definition of volunteer should be applied in a common-sense manner, which takes into

<sup>12</sup> The *Todaro* court’s use of the phrase “personal purpose or pleasure” comes from *Alamo Foundation*, note 6, *supra*. In turn, *Alamo Foundation* derived the standard from *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), in which the court looked at whether trainees of a company were employees under the FLSA.

<sup>13</sup> In *Cleveland v. City of Elmendorf*, the court “reserve[d] the question of whether an individual motivated by personal purpose, rather than civic, charitable, or humanitarian purposes is a ‘volunteer,’ as suggested by the Supreme Court” in *Alamo Foundation*, although the court advised that the definition of “volunteer” in § 553.101(a) “should be interpreted in the light of the Supreme Court’s definition of volunteer [in *Alamo Foundation*] as ‘an individual who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.’” 388 F.3d 527, 528, n. 6. *See also* note 12, *supra*.

account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided,” and stating that, “[w]e look at the objective facts surrounding the services performed to determine whether the totality of the circumstances supports a holding that, under the statute and under the regulations, the [workers] are volunteers”);<sup>14</sup> *Rodriguez v. Township of Holiday Lakes*, 866 F. Supp. at 1019 (the Administrator’s intent is “to limit that status [of volunteer] to a common-sense understanding of individuals engaged in activities that all parties involved clearly understand to [be] performed on a volunteer basis”).

By using a common-sense evaluation of the totality of circumstances in this instance, we may reasonably conclude that judges of election serve for civic or other altruistic or personal reasons, and that both the judges of election and the county boards of election intend that the election judges perform their work as volunteers. Certainly, serving as an election judge has traditionally been viewed as a hallmark of fulfilling one’s civic duty.

Moreover, the legal relationship between a board of elections and a judge of election provides other objective indicia of the status of judges of election as volunteers. For example, election judges serve a “term” of one year. R.C. 3501.22. Regardless of whether the service of an employee is governed by the civil service law, a collective bargaining agreement or other contract, or is “at the will” of the employer, employees are never said to serve a “term.” The infrequency with which judges of election perform their services also supports the conclusion that they are volunteers. If a judge worked at four elections per year, *see* note 1, *supra*, at fourteen hours per day—which you state is typical—they would work 56 hours *per year*. *Cf.*, *e.g.*, R.C. 124.18(A) (“[f]orty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state”).

Recent legislation now authorizes the State and political subdivisions to allow their employees to serve and receive pay as judges of election without loss of their “regular compensation” for that day. R.C. 3501.28(G). Sub. H.B. 262, 125th Gen. A. (2004) (eff. May 7, 2004). This authorization clearly reflects a policy to encourage civic participation in the electoral process and thereby promote the efficient operation of that process by ensuring fully-staffed polls.

#### **B. Payments Received by Judges of Election**

Title 29 U.S.C. § 203(e)(4)(A)(i) and 29 C.F.R. § 553.106(a) provide that a worker may receive expenses, reasonable benefits, a nominal fee, or any combination thereof, without losing his status as a volunteer. *See also* 29 C.F.R. § 553.104(a) (individuals who donate hours of service to a public agency for civic or humanitar-

<sup>14</sup> The court further explained in *Cleveland v. City of Elmendorf* that this “totality of the circumstances inquiry is supported by the Supreme Court’s definition of volunteer in [*Alamo Foundation*].... The Supreme Court determined whether non-paid regulars were volunteers by using a common-sense analysis, and there is no indication that the Department of Labor sought to reject such a notion when refining the definition in 29 C.F.R. § 553.101(a).” *Id.*, 388 F.3d at 528.

ian reasons are volunteers if their service is provided “with no promise, expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof, as discussed in § 553.106”). A determination whether the receipt of expenses, benefits, or fees would result in an individual losing his status as a volunteer “can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.” 29 C.F.R. § 553.106(f). We will first examine the significance of the “total amount of payments” language, and then the “economic realities” language.

### 1. “Total Amount of Payments”

As noted, the “total amount of payments made” includes expenses, benefits, and fees. *See* Dep’t of Labor Opinion Letter FLSA2005-51 (Nov. 10, 2005), slip op. at 2 (hereinafter Opinion Letter 2005-051) (“unreimbursed expenses will increase the amount of the stipend that may qualify as nominal”). An individual will not lose his volunteer status if he is reimbursed for out-of-pocket expenses including transportation expenses. 29 C.F.R. § 553.106(b). In this instance, judges of election receive no expenses, except for judges who transport ballots and supplies between the polling place and board of elections, and receive mileage. R.C. 3501.22; R.C. 3501.36. Also, an individual may receive “reasonable benefits” without losing his status as a volunteer. 29 C.F.R. § 553.106(d). Benefits are “considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers’ compensation) or pension plans or ‘length of service’ awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section.” *Id.* In this instance, judges of election do not receive benefits to which public employees are entitled, such as paid leave and insurance coverage. And an election judge is not a member of the Public Employees Retirement System unless she earns five hundred dollars or more per calendar year, an extremely unlikely event given the number of election days the judge would need to work to accrue this much compensation. R.C. 145.012(A)(5).

We turn now to whether the judges of election receive a “nominal fee.” “A nominal fee is not a substitute for compensation and must not be tied to productivity.” 29 C.F.R. § 553.106(e). *See* Dep’t of Labor Opinion Letter FLSA2006-28 (Aug. 7, 2006), slip op. at 3 (hereinafter Opinion Letter 2006-28) (compensation based on “per call,” “per shift,” or “other similar bases may be acceptable so long as they may fairly be characterized as tied to the volunteer’s sacrifice rather than productivity-based compensation”); Opinion Letter 2005-051, slip op. at 2 (“the regulations are focused on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA”).<sup>15</sup> In this instance, the election judges’ payment is based on hours worked, up to a

<sup>15</sup> In adopting § 553.106, the Department of Labor explained that the “purpose of the prohibition against productivity-based fees for volunteers was to preclude payments which were so closely tied to work production as to constitute compensation on a ‘piece rate’ wage or production bonus basis.” 52 Fed. Reg. 2012.

maximum per diem amount. Payment does not depend, however, upon the number of voters processed, votes cast, or other “productivity” or “performance” factor. The per diem paid to election judges may thus be said to be a better measure of their “sacrifice” than their productivity or job performance. *See Benschoff v. City of Virginia Beach*, 180 F.3d 136, 145 (4th Cir. 1999) (characterizing the death and injury benefits provided by a city to its volunteer rescue squad workers, as the city’s “mere recognition of the value of” its volunteers, and an insufficient basis “upon which to consider them ‘employees’ under the Act”). *See also Isaacson v. Penn Community Services, Inc.*, 450 F.2d 1306, 1311 (4th Cir. 1971) (a pre-1985 case) (“the Administrator would permit the payment of some subsistence without insisting that an employment relationship covered by the Act has been created”). *Cf.* 26 C.F.R. § 31.3401(a)-2(b)(2) (2007) (amounts paid to precinct workers for services performed at elections are not wages subject to withholding under the federal tax code).

Section 553.106(e) sets forth other factors that are used to determine whether a given amount is nominal: “The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year.” *See* Opinion Letter 2006-28, slip op. at 2 (“[t]hese factors focus upon whether the fee is actually more analogous to a payment for services or recompense for something performed and, hence, not nominal”); Opinion Letter 2005-051, slip op. at 2 (“historically, the factors enumerated in § 553.106(e) were intended to provide guidance in the context of whether firefighters were paid a nominal fee and qualify as *bona fide* volunteers,” but “in the context of school coaching or club sponsorship, the ‘substitute for compensation’ and ‘tied to productivity’ standards are still generally relevant”). In this instance, election judges are not available “around-the-clock” and provide services “as needed”—on election days. Although these election days are spaced throughout the year, election judges do not provide their services continuously throughout the year, but only on a very few number of statutorily-established days. Again, the per diem is more accurately described as a recognition of the election judges’ services, rather than as “recompense for something performed.”

## 2. “Economic Realities”

As noted, § 553.106(f) speaks in terms of the “economic realities of the particular situation.” Federal courts, however, have characterized the “economic realities” standard as being of limited use in determining whether someone is a volunteer or employee, noting that the standard is more appropriately used when determining a worker’s status as either an employee or an independent contractor. *Krause v. Cherry Hill Fire District 13*, 969 F. Supp. 270, 274-75 (D.N.J. 1997); *Rodriguez v. Township of Holiday Lakes*, 866 F. Supp. at 1020.

In *Krause*, however, the court did apply the “economic-dependence aspect” of the economic realities test, noting that the test “does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life.... Rather, it examines whether the workers are dependent on a particu-

lar business or organization for their continued employment” (citation omitted).<sup>16</sup> 969 F. Supp. at 275. The court further explained that, “[i]n a sense, this inquiry is related to the question of ‘permanency’ in the relationship between the worker and the putative employer.” *Id.* See also *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385-86 (3rd Cir. 1985) (“[t]he home researchers in this case were not in a position to offer their services to many different businesses and organizations. They worked on a continuous basis with DialAmerica and were able to work only when and if DialAmerica was in need of their services. Consequently, the home researchers were economically dependent on DialAmerica, indicating that they were indeed ‘employees’ of the defendant under the FLSA”).

In this instance, election judges are not economically dependent upon their election-day work, regardless of whether the issue is viewed as a dependence on the money received “for obtaining the necessities of life,” or a dependence on the board of elections “for their continued employment.” They have an “impermanent” relationship with the board that leaves them free to pursue gainful employment elsewhere.

Opinion Letter 2005-051 explains that the “economic realities” test “should include a comparison between the volunteer stipend and what it would otherwise cost [a public agency] to compensate someone to perform those services,” noting that DOL will presume the fee is nominal so long as it does not exceed 20% of what the agency would otherwise pay to hire a full-time employee for the same services. *Id.*, slip op. at 3. *Accord* Opinion Letter 2006-28, slip op. at 3 (a “willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA”). This 20% benchmark, which was applied within the context of school coaches and firefighters, respectively, may be of limited value in this situation, since, unlike a firefighter or school coach, the position of election judge would never be full-time. Use of the standard is also questionable due to the limited time-frame in which the election judges work. If the comparison were made, based only on an election day, a judges’ fee could possibly exceed 20% of what an employee would earn. If the comparison were made on an annual basis (based on a judge’s “term” of one year), however, the judges’ fee would not exceed the 20% standard.

Considering that the total amount that judges of election receive consists of a subsistence stipend that is paid in recognition of their services (and that is not compensation tied to productivity), and that they are paid no expenses or benefits (or are paid expenses or benefits that fall within the parameters of the federal regulations, as noted), we conclude that the “economic realities of the particular situation” do not result in the judges losing their status as volunteers under the FLSA.

## V. Conclusion

In sum, an election judge who is not otherwise employed by the Secretary

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<sup>16</sup> *Cf. Alamo Foundation*, 471 U.S. at 301 (“[t]he test of employment under the Act is one of ‘economic reality,’” and “in this case the associates were ‘entirely dependent upon the Foundation for long periods, in some cases several years,’” and were thus employees).

of State or a county board of elections, *see note , supra*, qualifies as a “volunteer” under 29 U.S.C. § 203(e)(4)(A) and the Department of Labor’s regulations. An election judge provides his services for civic or other personal reasons and the legal relationship between the judge and board of elections, and other objective indicia, evidence the judge’s status as a volunteer. Furthermore, the total amount received by an election judge is nominal, as viewed in the context of the economic realities of the situation. Because an election judge is a volunteer, he does not fall within the definition of “employee” for purposes of the FLSA. According to the terms of Ohio Const. art. II, § 34a, therefore, an election judge is not an “employee” who is entitled to receive the state minimum wage rate provided therein. Our analysis supports the presumption that the Amendment did not repeal R.C. 3501.28 by implication; thus, boards of elections must continue to pay judges of election in accordance with R.C. 3501.28.

Based on the foregoing, it is my opinion, and you are hereby advised that, a judge of election is not an “employee” who is entitled to receive the state minimum wage rate under Ohio Const. art. II, § 34a.