

OPINION NO. 86-025**Syllabus:**

1. Absent statutory authority therefor, Ohio Const. art. IV, §6(B) prohibits a municipal court judge from participating in an "in lieu of salary increase" pick up plan, whereby the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the judge, and does not impose a commensurate reduction in the judge's salary. A municipal court judge may, however, participate in a "salary reduction" pick up plan, under which the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the judge, and reduces the judge's salary by the amount of such contributions. Any such plan must be qualified with the Internal Revenue Service prior to implementation to insure favorable tax treatment is received.
2. Ohio Const. art. II, §20 prohibits the clerk of the Massillon Municipal Court from participating in an "in lieu of salary increase" pick up plan, whereby the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the clerk, and does not impose a commensurate reduction in the clerk's salary, unless a statute enacted prior to the commencement of his term authorizes him to participate in such a plan. Such clerk may, however, participate in a "salary reduction" pick up plan, under which the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the clerk, and reduces the clerk's salary by the amount of such contributions, whether such plan is instituted before or during his term of office. Any such plan must be qualified with the Internal Revenue Service prior to implementation to insure favorable tax treatment is received.

To: Robert D. Horowitz, Stark County Prosecuting Attorney, Canton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 6, 1986

I have before me your predecessor's request for my opinion concerning the authority of a municipal court judge and a municipal court clerk to participate in a pension pick up plan, whereby the appropriate public employer would assume and pay the employee contributions to the Public Employees Retirement System on behalf of the judge and clerk. Based upon your conversation with members of my staff, it is my understanding that you wish to know whether a municipal court judge and a municipal court clerk may participate in either a "salary reduction" or "in lieu of salary increase" pick up plan. The question has arisen because the compensation of such officers is paid in part from the county treasury as well as in part from the city treasury. See R.C. 1901.11; R.C. 1901.31. See also 1984 Op. Att'y Gen. No. 84-036 (a public officer who is entitled to participate in a pick up plan and who is paid from two public treasuries must implement two pick up plans if he wishes to have his contributions picked up as part of both components of compensation).

Pick up plans, which are implemented primarily to take advantage of favorable income tax treatment,¹ have been dealt with extensively in several opinions of this office, most recently in 1984 Op. Att'y Gen. No. 84-058 and Op. No. 84-036. By way of brief summary, pick up plans take two forms. The first, the "salary reduction" plan, finds the appropriate employer assuming and paying "each employee's contribution to [the Public Employees Retirement System]² and reduc[ing] each employee's salary by the amount of that contribution, so that there [is] no increased cost to the [employer]." (Footnote added.) Op. No. 84-036 at 2-109. The second, the "in lieu of salary increase" plan, is in actuality a fringe benefit. The employer assumes full payment of its employees' pension contributions without imposing a commensurate reduction in the salaries received by those workers, thereby giving rise to an increased financial burden on the employer. Op. No. 84-036.

¹ As summarized in 1982 Op. Att'y Gen. No. 82-071 at 2-200 to 2-201:

It is my understanding that the motivation for employers to "pick up" these contributions is found in federal tax law. Under 26 U.S.C. §414(h)(2), when a governmental employer, see 26 U.S.C. §414(d), picks up employee contributions to a pension plan qualified under 26 U.S.C. §§401(a) and 501(a) (as PERS is), such contributions are treated as employer contributions, even though they may be designated under state law as employee contributions. See 1979 Op. Att'y Gen. No. 79-001; 1978 Op. Att'y Gen. No. 78-049. Accordingly, the contributions are excludable from the employee's wages for purposes of income tax withholding, 26 U.S.C. §3401(a)(12)(A), and from the employee's gross income until such funds are distributed to the employee, 26 U.S.C. §402. See Rev. Rul. 36, 1981-1 C.B. 255; Rev. Rul. 35, 1981-1 C.B. 255; Rev. Rul. 462, 1977-2 C.B. 358.

² R.C. 145.47 reads in pertinent part:

Each public employee who is a member of the public employees retirement system and who is a

In order to determine whether a municipal court judge may participate in a pension pick up plan, it is necessary to examine Ohio Const. art. IV, §6(B) which states in part: "[t]he judges of...all courts of record established by law, shall...receive, for their services such compensation as may be provided by law...Judges shall receive no fees or perquisites..." As summarized in 1983 Op. Att'y Gen. No. 83-042 at 2-162: "Pursuant to this constitutional provision, municipal court judges are prohibited from receiving fees or perquisites, apart from their compensation established by law. See R.C. 1901.02 (municipal courts are courts of record); 1973 Op. Att'y Gen. No. 73-081." (Footnote omitted.) Thus, whether Ohio Const. art. IV, §6(B) prohibits a municipal court judge from participating in a pension pick up plan depends upon whether such participation constitutes the receipt of a fee or perquisite by the judge.

The meaning of the term "perquisite" was recently addressed in City of Kettering v. Berger, 4 Ohio App. 3d 254, 259, 448 N.E.2d 458, 463-64 (Montgomery County 1982), as follows:

All of the definitions of the term "perquisite" contemplate a profit to be secured by the officer out of the office he occupies, in addition to his fixed compensation. A "perquisite" is something gained from a place of employment over and above the ordinary salary or fixed wages for services rendered, especially a fee allowed by law to an officer for a specific service. (Emphasis added.)

The compensation of municipal court judges is set by the General Assembly as provided for in R.C. 1901.11. Nothing in R.C. 1901.11 authorizes a municipal court judge to participate in an "in lieu of salary increase" pick up plan which, as set forth above, is a fringe benefit, State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976) (for purposes of Ohio Const. art. II, §20, "[f]ringe benefits...are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check"). It is clear that a judge's participation in an "in lieu of salary increase" pick up plan is "a profit...secured by the officer out of the office he occupies." Thus, it appears that a municipal court judge's participation in an "in lieu of salary increase" pick up plan is a component of his compensation in addition to that fixed by the General Assembly and, as such, constitutes a "perquisite" for purposes of Ohio Const. art. IV, §6(B). In absence of statutory authority therefor, a municipal court judge may not, pursuant to Ohio Const. art. IV, §6(B), participate in an "in lieu of salary increase" pick up plan. See Op. No. 84-058; Op. No. 83-042.

township constable, police officer in a township police department or district, sheriff, deputy sheriff, or county narcotics agent shall contribute nine and one-half per cent of his earnable salary or compensation to the employees' savings fund, and every other public employee who is a member of the public employees retirement system shall contribute eight per cent of his earnable salary or compensation to the employees' savings fund except that the public employees retirement board may raise the contribution rate to a rate not greater than ten per cent of the employees' earnable salary or compensation. (Emphasis added.)

I reach a different result, however, with respect to a municipal court judge's participation in a "salary reduction" pick up plan. As stated above, a "salary reduction" pick up plan is not a fringe benefit, but is merely a different method of providing compensation. See Op. No. 84-058; Op. No. 84-036. No provision of law of which I am aware prohibits a municipal court judge from participating in a "salary reduction" pick up plan. Cf. Op. No. 84-058 (judges of courts of common pleas may participate in a "salary reduction" pick up plan).

With respect to a municipal court clerk's participation in a pension pick up plan, you specifically ask about the application of Ohio Const. art. II, §20 which states in pertinent part: "The general assembly, in cases not provided for in this constitution, shall fix...the compensation of all officers; but no change therein shall effect the salary of any officer during his existing term...." As stated in Op. No. 84-058 at 2-192, "public officers whose compensation is set by statute are not entitled to receive fringe benefits, the payment of which is not specifically or impliedly authorized by statute." (Citations omitted.) Further, an officer who is subject to the provisions of Ohio Const. art. II, §20 is prohibited from receiving an increase in salary during his existing term. State ex rel. Glander v. Ferguson, 148 Ohio St. 581, 76 N.E.2d 373 (1947).

R.C. 1901.31 provides for municipal court clerks to be either elected or appointed and specifies how such clerks' compensation shall be determined. The provisions of Ohio Const. art. II, §20 have been applied to elected municipal court clerks. Schultz v. Garrett, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983). Due to the varying methods in which municipal court clerks take office and have their compensation determined, see R.C. 1901.31(A) and (C), I will address the application of Ohio Const. art. II, §20 only to the Massillon Municipal Court clerk about whom you have asked.

Pursuant to R.C. 1901.31(A)(2), the clerk of the Massillon Municipal Court is elected and serves a term of six years, R.C. 1901.31(A)(1). Since, as stated in your letter, the territory served by the Massillon Municipal Court has a population in excess of one hundred thousand, the clerk "shall receive annual compensation in a sum equal to eighty-five per cent of the salary of a judge of the court," R.C. 1901.31(C). Thus, the compensation of the clerk of the Massillon Municipal Court is set by the General Assembly. See Schultz v. Garrett.

Regarding the Massillon Municipal Court clerk's participation in an "in lieu of salary increase" pick up plan, Ohio Const. art. II, §20 prohibits such clerk from participating in such a plan because the plan is a fringe benefit, a component of compensation, and has not been provided for by the General Assembly.

With respect to the clerk's participation in a "salary reduction" pick up plan, I note first, as set forth above, that since such a plan merely alters the method in which his compensation is paid, the clerk's participation in such a plan does not violate the prohibition contained in Ohio Const. art. II, §20 against a public officer's receipt of compensation other than as fixed by the General Assembly. Further, since the clerk's participation in a "salary reduction" plan does not affect the amount of compensation paid, there is no change in compensation, and the prohibition against in-term increases in

compensation set forth in Ohio Const. art. II, §20 would not be violated if a "salary reduction" plan were instituted during the clerk's term. See generally Op. No. 84-036 (concluding that the prohibition of art. II, §20 against in-term changes in compensation is not violated where a public officer participates in a "salary reduction" plan beginning after the commencement of his term).

As in Op. No. 84-036, I cannot emphasize enough the importance of contacting the Internal Revenue Service to insure that any pick up plan devised complies with pertinent federal regulations in this subject area. This would be particularly prudent in the present situation since it is my understanding that federal law may treat elected officers differently from other employees. See Op. No. 84-036 at 2-114 n. 4. Moreover, there may be restrictions on the retroactive application of the pick up plan, which is being considered in this case. PERS also should be contacted to take advantage of its expertise and to avoid unnecessary administrative delays. Id.

In conclusion, it is my opinion, and you are advised that:

1. Absent statutory authority therefor, Ohio Const. art. IV, §6(B) prohibits a municipal court judge from participating in an "in lieu of salary increase" pick up plan, whereby the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the judge, and does not impose a commensurate reduction in the judge's salary. A municipal court judge may, however, participate in a "salary reduction" pick up plan, under which the appropriate public employer assumes and pays the employee contributions to the Public Employees Retirement System on behalf of the judge, and reduces the judge's salary by the amount of such contributions. Any such plan must be qualified with the Internal Revenue Service prior to implementation to insure favorable tax treatment is received.
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