

OPINION NO. 84-058

Syllabus:

1. A county elected official may not participate in a "pick up in lieu of salary increase" plan, even assuming that such plan was implemented prior to the commencement of his term, unless a statute enacted prior to the commencement of his term authorizes him to participate in such plan.
2. Judges of courts of common pleas may not participate in a "pick

up in lieu of salary increase" plan in the absence of statutory authority therefor.

3. County elected officials and judges of courts of common pleas may participate in a "salary reduction" pick up plan, even assuming such plan was implemented after the commencement of their terms. Any such plan must be qualified with the Internal Revenue Service prior to implementation to insure favorable tax treatment is received.

To: James R. Unger, Stark County Prosecuting Attorney, Canton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984

I have before me your request for my opinion on whether county appointing authorities have the power to pick up part or all of the contributions of elected county officials and elected county judges to the Public Employees Retirement System (PERS) during the term of office of such public officials. You state in your letter that this question has arisen in the following context:

The Board of Stark County Commissioners as well as other elected county officials have indicated their desire as a new fringe benefit to "pick up" and pay on behalf of the county employees 4.25 percent of the 8.50 percent employee contribution required to be made to the Public Employees Retirement System. A resolution for such "pick up" of a portion of employee contributions to the Public Employees Retirement System is scheduled to go into effect for such county employees in 1984.

A request has been made by the Stark County Auditor and the Stark County Commissioners to ascertain from you whether the "pick up" or payment of the 4.25 percent of the 8.50 percent required contribution to the Public Employees Retirement System can also be made for elected county officials and judges of the Stark County Common Pleas Court. The question which arises is whether the "pick up" of such payment constitutes a change in compensation of such elected officials which would be prohibited by Article II, Section 20 of the Ohio Constitution.

I turn first to the question whether elected county officials may participate in a pick up plan which is implemented as a fringe benefit during the term of office of these officials.¹ You have drawn my attention to Ohio Const. art. II, §20, which reads: "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." This provision is applicable to county elected officers. See State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); State ex rel. DeChant v. Kelsner, 133 Ohio St. 429, 14 N.E.2d 350 (1938); 1981 Op. Att'y Gen. No. 81-099. In State ex rel. Parsons v. Ferguson, the court established that fringe

¹ Because you have indicated in your letter that the pick up plan is being implemented as a fringe benefit, I assume that the salaries of county employees are not being reduced for tax purposes by the amount of the PERS pick up. As explained in 1984 Op. Att'y Gen. No. 84-036, a pick up under this latter type of plan called a "salary reduction" plan, is not a fringe benefit, but is merely a different method of paying an employee's salary. The discussion which immediately follows relates to a "pick up in lieu of salary increase" plan, under which the employer pays an employee's retirement contribution in addition to the salary the employee is currently receiving, and which is clearly a fringe benefit. See Op. No. 84-036. See also 1982 Op. Att'y Gen. No. 82-097; 1979 Op. Att'y Gen. No. 79-001; 1978 Op. Att'y Gen. No. 78-049. I will then discuss your question as it relates to pick ups under a "salary reduction" plan.

benefits are a form of compensation for purposes of art. II, §20 and thus, art. II, §20 prohibits those public officers subject to its terms from receiving an increase in the value of fringe benefits during the course of their term. See Op. No. 81-099. See also State ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62, 330 N.E.2d 684 (1975) (the terms "salary" and "compensation" are synonymous as used in art. II, §20). Thus, in specific response to your question, Ohio Const. art. II, §20 prohibits elected county officials from participating in a pick up plan, implemented as a fringe benefit, after the beginning of the officials' terms. See 1984 Op. Att'y Gen. No. 84-036.

I note that your question, as well as your reference to art. II, §20 presupposes that a county elected official would be entitled to participate in a pick up plan which was implemented by a county appointing authority prior to the commencement of his term. It is well-established, however, that 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. See Ohio Const. art. II, §20 ("[t]he General Assembly. . .shall fix. . .the compensation of all officers"); Op. No. 84-036; 1983 Op. Att'y Gen. No. 83-042. I am unaware of any statute which authorizes a county official to participate in a pick up plan which he has implemented as a fringe benefit on behalf of his employees. Thus, I conclude that a county elected official is not entitled to participate in a pick up plan which has been implemented as a fringe benefit for his employees, even assuming that such officer has taken office after the commencement of the pick up plan. Op. No. 84-036.

You have also asked about the participation of judges of courts of common pleas in a pick up plan. The salary of common pleas court judges, excluding the costs of certain health care benefits paid by a governmental entity on behalf of such judges, is fixed by the General Assembly and paid from the state treasury pursuant to R.C. 141.04 and R.C. 141.06. Judges of courts of common pleas are entitled to additional compensation, set by statute, which is payable from the county treasury. R.C. 141.05; R.C. 141.07. There is no statutory authority for a common pleas court judge to participate in a pick up program. I draw your attention to Ohio Const. art. IV, §6(B), which provides in part: "Common pleas judges and judges of divisions thereof. . .shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites. . . ." In addition, R.C. 141.13 reads: "No fees in addition to the salaries and compensation named in sections 141.02 to 141.12, inclusive, of the Revised Code, shall be allowed to any such officer. . . . The salaries provided in such sections shall be in full compensation for any services rendered by such officers and employees, payment of which is made from the state treasury." Thus, common pleas court judges are prohibited from receiving any fringe benefits not provided by statute. See Op. No. 83-042. See also 1982 Op. Att'y Gen. No. 82-022. I am unaware of any statute authorizing common pleas court judges to participate in a pick up program. Thus, common pleas court judges may not participate in a pick up plan implemented as a fringe benefit for county employees. Op. No. 84-036.

As noted in footnote 1, there is a distinction between a "pick up in lieu of salary increase" plan, which was discussed above, and a pick up under a "salary reduction" plan. Under a "salary reduction" plan, an employee's salary is decreased for tax purposes by the amount of the PERS contribution which has been picked up. This type of pick up is not a fringe benefit, but is merely a different method of paying an employee's salary. See Op. No. 84-036. Because there is no actual change in compensation, public officers whose salaries are set by statute, including county elected officials and common pleas court judges, may participate in such a plan, even though the plan was instituted prior to the commencement of the officers' terms. See Op. No. 84-036. I wish to emphasize that this conclusion is reached only in terms of what is permissible under state law with regard to pick up plans. Federal law controls the actual qualification and implementation of pick up plans. See 26 U.S.C. §414(h)(2). An employer must contact the Internal Revenue Service for guidance in meeting the numerous federal requirements imposed on pick up plans in order to insure favorable tax treatment is afforded any such plan. All pick up plans must be qualified with the Internal Revenue Service before they are implemented. In addition, PERS should be contacted for assistance in implementing a plan, in order to insure its administrative requirements are met.

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

1. A county elected official may not participate in a "pick up in lieu of salary increase" plan, even assuming that such plan was implemented prior to the commencement of his term, unless a statute enacted prior to the commencement of his term authorizes him to participate in such plan.
2. Judges of courts of common pleas may not participate in a "pick up in lieu of salary increase" plan in the absence of statutory authority therefor.
3. County elected officials and judges of courts of common pleas may participate in a "salary reduction" pick up plan, even assuming such plan was implemented after the commencement of their terms. Any such plan must be qualified with the Internal Revenue Service prior to implementation to insure favorable tax treatment is received.