

October 13, 2021

Stephanie Hess
Administrative Director
The Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

SYLLABUS:

2021-023

1. Article IV, Section 6(B) of the Ohio Constitution allows the justices of the Supreme Court to receive “compensation as may be provided by law.” The Department of Administrative Services’ incentive program to encourage COVID-19 vaccination qualifies as compensation “provided by law.” Section 6(B), therefore, does not prohibit justices of the Ohio Supreme Court from participating in the incentive program.



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OPINION NO. 2021-023

Stephanie Hess
Administrative Director
The Supreme Court of Ohio
65 South Front Street
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Dear Director Hess:

The Department of Administrative Services—which this opinion calls the “Department”—recently announced that it is offering monetary incentives to encourage state employees to receive COVID-19 vaccinations. Under the program, state employees will be eligible to receive up to \$1,000 if (1) they receive a vaccination and (2) their employing agency achieves certain vaccination milestones. *See* Ohio Dept. of Adm. Servs., *Employee Benefits: Latest News*, <https://perma.cc/VR99-8TJ2>. (The program, it is worth noting, does not apply to county or local employees. *See id.*)

You requested an opinion regarding whether Article IV, Section 6(B) of the Ohio Constitution prohibits justices of the Ohio Supreme Court from participating in the incentive program. For the reasons described below, I conclude that it does not.

I

I begin with the constitutional text. Relevant here, the Ohio Constitution says:

The *judges of the Supreme Court*, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, *shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office.* The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. *Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States.* All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

Ohio Constitution, Article IV, Section 6(B) (emphases added).

Breaking down that text, Section 6(B) outlines which forms of judicial compensation are permissible and which are not. The provision *allows* judges to receive “compensation as may be provided by law.” *Id.* In other words, it empowers the General Assembly to authorize judicial compensation via statute. At the same time, Section 6(B) *prohibits* judges from receiving any fees or perks beyond the compensation that is “provided by law.” Ohio Constitution, Article IV, Section 6(B). As one Ohio court has explained, judges cannot receive profits “in addition to [their] fixed compensation”—“something gained ... over and above the ordinary.” *Kettering v. Berger*, 4 Ohio App. 3d 254, 259, 448 N.E.2d 458 (2d Dist. 1982). Or, stated in the affirmative, judges may receive only those “benefits that are authorized by statute.” 1993 Op. Att’y Gen. No. 93-043, at 2-218; *see* 1983 Op. Att’y Gen. No. 83-

042, at paragraph five of the syllabus; *see also* 1984 Op. Att’y Gen. No. 84-058, at paragraph two of the syllabus.

Precedent from related areas offers additional insight about Section 6(B)’s parameters. Consider first the Ohio Supreme Court’s decision in *State ex rel. Parsons v. Ferguson*, 46 Ohio St.2d 389, 348 N.E.2d 692 (1976) (*per curiam*). That case involved Article II, Section 20 of the Ohio Constitution, a provision that applies to non-judicial officeholders. The provision empowers the General Assembly to fix “compensation” for such officers, but it prohibits the General Assembly from changing that compensation during an officer’s “existing term.” Ohio Constitution, Article II, Section 20. The question presented in *Ferguson* was whether an in-term change to a county officer’s health insurance qualified as “compensation.” 46 Ohio St. 2d at 390–91. The Court held that it did. *Id.* at 391. More precisely, the Court held that compensation includes “[f]ringe benefits.” *Id.* The Court suggested, moreover, that a fringe benefit includes any “valuable perquisites of an office.” *Id.* The takeaway is that “compensation” and “perquisites” are both broad terms that likely cover most payments relating to an employee’s healthcare.

Consider also the Ohio Supreme Court’s decision in *State ex rel. Wallace v. Celina*, 29 Ohio St.2d 109, 279 N.E.2d 866 (1972). As in *Ferguson*, the Court in *Celina* addressed the constitutional provision prohibiting in-term changes to officers’ compensation. *See* Ohio Constitution, Article II, Section 20. But the Court compared that provision to the differing language within Article IV, Section 6(B). It stressed that “Section 6(B) does not prohibit salary increases during term for the judicial officers therein enumerated.” *Celina*, 29 Ohio St. 2d at 111. That statement reinforces the textual points outlined above: Section 6(B), though prohibiting perks *beyond* the compensation “provided by law,” does not forbid statutorily-authorized increases to a judge’s

compensation. What is more, *Celina* clarifies that, for the judicial officers covered under Section 6(B), there is no bar on salary increases during a judicial term. *Id.*

Putting all this together, Section 6(B) draws a very simple distinction. Judges may receive compensation that flows from statutory authority. But they may not receive other compensation “apart from the compensation established by law.” 1993 Op. Att’y Gen. No. 93-043, at 2-218 (quotation omitted).

II

With the above distinction in mind, I turn to the Department’s incentive program. The program, once again, will offer monetary incentives (up to \$1,000) for state employees who receive COVID-19 vaccinations. *See* Ohio Dept. of Adm. Servs., *Employee Benefits: Latest News*, <https://perma.cc/VR99-8TJ2>. As a threshold matter, it is safe to assume that the incentives trigger a Section 6(B) analysis. That is to say, a money award for getting vaccinated presumably qualifies as both “compensation” and a “perquisite” for purposes of Section 6(B). *See Ferguson*, 46 Ohio St. 2d at 390–91. The critical question thus becomes this: is the vaccine mandate compensation “provided by law” and thus permissible under Section 6(B)?

The answer, in my view, is “yes.” The General Assembly has granted the Department broad authority to manage the compensation and benefits of state employees. *See generally* R.C. Chapter 124. Among other things, the Revised Code empowers the Department to determine healthcare benefits for such employees. *See* R.C. 124.82. And the Department’s healthcare power includes the power to provide benefits directly to state employees. *See* R.C. 124.82(D). Beyond that, the Revised Code separately gives the Department the flexibility to establish experimental benefit programs. The relevant statute says that the Department “may establish..., an experimental program to be implemented on a limited

basis” that grants employees “benefits that differ from” the benefits specifically listed in other statutes. R.C. 124.133.

In my opinion, the incentive program is within the Department’s statutorily-delegated powers and is thus compensation “provided by law.” See Ohio Constitution, Art. IV, Section 6(B). To begin, the program is within the Department’s general authority to select and administer healthcare benefits. See, e.g., R.C. 124.82(D). Nothing is unusual, after all, about employers offering wellness incentives as part of their overall approach to employee healthcare. See Soeren Mattke, et al., *Workplace Wellness Programs Study*, Rand Health Quarterly (June 1, 2013), <https://perma.cc/B2AD-Q3NU>; Harvard Public Health, *Employer health incentives: Employee wellness programs prod workers to adopt healthy lifestyles*, (Winter 2009), <https://perma.cc/G8SY-EMPC>. The program may also qualify as an experimental benefit program within the Department’s power under R.C. 124.133. Indeed, unusual situations like the COVID-19 pandemic seem to be the very reason for leaving the Department some flexibility to experiment with unenumerated benefits given on a limited basis.

To be sure, your question is a novel one. Relatively little caselaw exists concerning the scope of Section 6(B)’s prohibition. And there is even less authority concerning the scope of the Department’s power to administer incentive programs for state employees. Given the lack of authority, one final point is worth a quick mention. The Ohio Supreme Court has held that, even when a payment is improperly made to a state employee, the State cannot recover payments made and received “in good faith and under color of law.” *Ferguson*, 46 Ohio St. 2d at 392; *accord City Of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 402, 659 N.E.2d 781 (1996). The above analysis would presumably satisfy that safe harbor.

Conclusion

Accordingly, it is my opinion that:

1. Article IV, Section 6(B) of the Ohio Constitution allows the justices of the Supreme Court to receive “compensation as may be provided by law.” The Department of Administrative Services’ incentive program to encourage COVID-19 vaccination qualifies as compensation “provided by law.” Section 6(B), therefore, does not prohibit justices of the Ohio Supreme Court from participating in the incentive program.

Respectfully,



DAVE YOST
Ohio Attorney General