

OPINION NO. 83-042**Syllabus:**

1. A city may not pay the registration fee required by the Ohio Supreme Court on behalf of the city law director and assistant city law directors unless the legislative authority of the city, in accordance with all applicable provisions of law, enacts an ordinance or takes other legislative action permitting the payment of such fee as part of the compensation of such individuals or authorizing the payment of such fee on the basis that it furthers a municipal public purpose.
2. A city may not pay the registration fee required by the Ohio Supreme Court on behalf of the judges of the municipal court located within the city as part of the compensation of such judges, and Ohio Const. art. IV, §6(B) prohibits the judges from receiving the benefit of the payment of such fees as a perquisite apart from the compensation established by law.

3. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the county's prosecuting attorney as part of the compensation of the prosecutor.
4. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the county's prosecuting attorney as a matter apart from compensation unless the payment of such fee is necessarily incidental to a power or duty imposed upon the county by the General Assembly.
5. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the judges of the court of common pleas or the county court, and Ohio Const. art. IV, §6(B) prohibits the judges from receiving the benefit of the payment of such fee as a perquisite apart from the compensation established by law.
6. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of assistant prosecuting attorneys unless the county prosecuting attorney authorizes the payment of such fee as part of the compensation of the assistants and such payment falls within the aggregate sum set for the compensation of the assistants, clerks, and stenographers in the prosecutor's office, or unless the payment of such fee is necessarily incidental to a power or duty imposed upon the county by the General Assembly.
7. A state agency may not pay the registration fee required by the Ohio Supreme Court on behalf of the agency's staff attorneys unless an enactment of the General Assembly specifically authorizes such payment or the payment of such fee is necessarily incidental to a power or duty imposed upon the agency by the General Assembly.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 11, 1983

I have before me your opinion request concerning the authority of cities, counties, and state agencies to pay, on behalf of various public officials and employees, the registration fee required by the Ohio Supreme Court for all attorneys admitted to the practice of law in Ohio. By way of background, you state:

Rule VII [of the Supreme Court Rules for the Government of the Bar of Ohio] requires attorneys who wish to engage in the practice of law or to hold themselves out as being authorized to practice law or to hold judicial office in Ohio to register as an active attorney. The fee for registration is \$100.00. The registration is for the period of September 1, 1983 to August 31, 1985. The registration fee is required to be sent to the Supreme Court on or before August 15, 1983.

Your specific questions are as follows:

1. May a city, by the enactment of an ordinance, pay the registration fee for its municipal court judges, law director, and assistant law directors?
2. May a county, by the enactment of a resolution, pay the registration fee for common pleas judges or county judges, county prosecutor, and assistant county prosecutors?
3. May a state agency, with the approval of its appointing authority pay the registration fee for its staff attorneys?

In order to answer your questions, it is first necessary to determine whether the payment of the Supreme Court registration fee on behalf of certain public employees may constitute a fringe benefit to such persons. As stated in 1982 Op. Att'y Gen. No. 82-006, at 2-16 to 2-17, "a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment. Madden v. Bower, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969)." If the registration fee is paid by an employer on behalf of an employee as an inducement for the employee to continue his employment, the payment of such fee constitutes a fringe benefit which is part of the employee's compensation.

You also ask about payment of the registration fee on behalf of various public officers. In State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976), the court discussed whether the county's payment of health insurance premiums for two elected county officers constitutes the payment of compensation for purposes of Ohio Const. art. II, §20. The court stated:

Fringe benefits, such as the payments made here [for health insurance premiums], are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check. It is obvious that an office holder is benefitted [sic] and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for [fringe] benefits may not constitute "salary," in the strictest sense of that word, but they are compensation.

46 Ohio St. 2d at 391, 348 N.E.2d at 694. As with the payment of insurance premiums, where the state, a county, or a city pays the Supreme Court registration fee for one of its officers, such payment benefits and enriches such officer. I believe that payment of such fee may, therefore, constitute compensation to the officer.

Your first question is whether a city may, by the enactment of an ordinance, pay the Supreme Court registration fee on behalf of the city law director, assistant city law directors, and municipal court judges. It is clear that a city has authority, pursuant to Ohio Const. art. XVIII, §3, to fix the compensation of its officers and employees. Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980); Village of Bellville v. Beal, No. CA-2062 (Ct. App. Richland County 1982). Since the city law director and assistant city law directors are in the service of the city, see State ex rel. Kohl v. Dunipace, 56 Ohio St. 2d 120, 382 N.E.2d 1358 (1978), the city may pay their registration fees as part of their compensation, absent any local provision of law or applicable statutory provision prohibiting such payment.

You also ask whether a city may pay the Supreme Court registration fee required to be paid by the judges of the municipal court located within the city.

¹ Your question assumes that a city would carry out its decision to pay the Supreme Court registration fees through the enactment of an ordinance. I note, however, that it may also be possible for a city to carry out its decision to pay such fees through the adoption of a resolution, assuming, of course, that there is no provision of law prohibiting such action. See generally Wuebker v. Hopkins, 29 Ohio App. 386, 388, 163 N.E. 566, 566 (Cuyahoga County 1928) ("[u]nless [a] statute prescribes one or the other methods of procedure, the adoption of a resolution is the proper procedure for an informal enactment providing for the disposition of a particular item of business, while the passage of an ordinance is the proper procedure for the enactment of a regulation of a general or permanent nature"). See also Campbell v. Cincinnati, 49 Ohio St. 463, 470, 31 N.E. 606, 607 (1892) ("[a] distinction is sometimes drawn between an ordinance and a resolution, by which, the one prescribes a permanent rule of conduct or government, while the other is of a temporary character and prescribes no permanent rule of government").

The compensation of municipal court judges is set by the General Assembly, not by the city in which the court is located. See R.C. 1901.11. See generally 1983 Op. Att'y Gen. No. 83-009 (compensation of municipal court judges). Specifically excepted from the compensation scheme set forth in R.C. 1901.11 is that part of a judge's compensation for "any portion of the cost, premium, or charge for health, medical, hospital, dental, or surgical benefits, or any combination thereof, covering a judge of the municipal court and paid on his behalf by a governmental entity." R.C. 1901.11. I am not, however, aware of any other exceptions to the compensation scheme set by the General Assembly for municipal court judges. Since a city within which a municipal court is located has no authority to set the compensation of the municipal court judges, the city has no authority to pay the registration fee for municipal court judges as part of their compensation. See State ex rel. Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929) (pursuant to Ohio Const. art. IV, §1, the General Assembly has power to create municipal courts and to provide for their maintenance; Ohio Const. art. XVIII does not abridge the sovereignty of the state over municipalities in respect to its courts); 1980 Op. Att'y Gen. No. 80-014.

Your opinion request specifically mentions Op. No. 82-006, which states in paragraph two of the syllabus:

Municipal funds may be expended to purchase coffee, meals, refreshments or other amenities for municipal officers, employees or other persons, if the legislative body of the municipality has determined that such expenditures are necessary to further a public purpose and if its determination is not manifestly arbitrary or unreasonable.

Thus, there arises the question whether the expenditure of municipal funds for the payment of the Supreme Court registration fee for municipal court judges may fall within this broad rule. The authority of municipalities to expend funds for a public purpose² is limited by the qualification that such purpose must be a municipal public purpose. See Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968); State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951). As stated in paragraph two of the syllabus of Bazell:

The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable.

Under this principle, it might be concluded that, if there are no local provisions or applicable statutory provisions prohibiting such payment, a municipality may expend municipal funds to pay the registration fee on behalf of the judges of the municipal court located within such municipality, provided that the legislative body of the municipality determines that such expenditure constitutes a valid municipal public purpose and that such decision is not manifestly arbitrary or unreasonable. Such a conclusion would clearly apply to a legislative determination to pay the registration fee on behalf of the city law director or assistant city law directors on the basis that such a payment would further a municipal public purpose.

There is, however, a constitutional provision that would prevent the application of such a result to a judge. Ohio Const. art. IV, §6(B) states:

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

² See generally Op. No. 82-006 (discussing criteria for determining whether an expenditure constitutes a public purpose).

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. (Emphasis added.)

Pursuant to this constitutional provision, municipal court judges are prohibited from receiving fees or perquisites,³ 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. The term "perquisites," as used in Ohio Const. art. IV, §6(B) is not defined. However, a perquisite is commonly understood to mean: "something additional to regular profit or pay, resulting from one's position or employment, esp. something customary or expected." Webster's New World Dictionary 1060-1061 (2d college ed. 1978). It appears that payment of a municipal court judge's Supreme Court registration fee by a municipality under the theory that such payment promotes a municipal public purpose would fall within the definition of a perquisite. See generally Parsons (health insurance premiums, not paid directly to the officer, but paid on his behalf, are fringe benefits). Ohio Const. art. IV, §6(B) would, therefore, prohibit a judge from receiving such a benefit.

Your second question asks whether a county may, by the enactment of a resolution, pay the attorney registration fee for the county prosecutor, assistant county prosecutors, common pleas court judges and county court judges.⁴ Unlike the legislative authority of a city, a board of county commissioners is a creature of statute and, therefore, has only those powers expressly conferred by statute or necessarily implied therefrom. See State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947). As a general rule, a public body, such as a board of county commissioners, may expend public funds only pursuant to clear statutory authority. Any doubt as to the authority to make an expenditure must be resolved against the expenditure. See State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916). The county may pay the Supreme Court registration fee on behalf of each of the persons listed in your second question only if the county has statutory authority to expend funds for such benefit as part of the person's compensation or if such expenditure is necessary to perform a function or to exercise a power expressly conferred upon the county by statute or necessarily implied therefrom. Op. No. 82-006.

The prosecuting attorney is an elected county officer, R.C. 309.01, whose compensation is fixed by statute, R.C. 325.11. See State ex rel. Finley v. Lodwich, 137 Ohio St. 329, 29 N.E.2d 959 (1940). The board of county commissioners does have limited authority over the compensation of the prosecuting attorney by virtue of R.C. 305.171, which authorizes the board to contract, purchase, or otherwise procure certain group insurance policies for county officers and employees. I am not, however, aware of any statute which specifically or by implication authorizes the board of county commissioners to pay the Supreme Court registration fee for the prosecuting attorney as part of his compensation. Apart from the matter of compensation, a county may pay such registration fee on behalf of the county prosecutor if such payment is necessarily incidental to the performance of a function or the exercise of a power conferred upon the county by statute. See Op. No. 82-006.

³ See 1982 Op. Att'y Gen. No. 82-022 at 2-68 ("the prohibition against the receipt of fees or perquisites set forth in Art. IV, §6 applies to all judges").

⁴ Your question postulates that the county will be acting by resolution. I am, therefore, assuming that to be the case and am not considering whether the payments in question may be made pursuant to any other procedure.

You also ask whether the county may pay the Supreme Court registration fee for the assistant county prosecutors. Pursuant to R.C. 309.06, the prosecuting attorney may appoint assistant prosecuting attorneys and fix their compensation. The prosecuting attorney's authority to fix his assistants' compensation is limited by the aggregate sum fixed by the court of common pleas for the compensation of assistants, clerks, and stenographers of the prosecuting attorney's office. R.C. 309.06. Because the prosecuting attorney may employ and fix the compensation of his assistants within certain limitations, he may provide them with fringe benefits, subject to any constricting statutory authority. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). The payment of the attorney registration fee for assistant prosecuting attorneys is not directly addressed by any statutory provision which would constrict the prosecuting attorney's authority to pay such fee as a part of his assistants' compensation. So long as the payment of the attorney registration fee for his assistants does not cause the prosecutor to exceed the aggregate sum set for the compensation of the assistants, clerks, and stenographers in his office, he may authorize the payment of such fee for his assistants. Once the prosecutor has properly authorized such payment as part of his employees' compensation, the county may pay the fees. See Op. No. 82-006 (syllabus, paragraph one) (fringe benefits may be provided by units of local government to their employees as a form of compensation, if authorized by the officer or body having power to fix such employees' compensation). As an alternative, if the prosecuting attorney should decide not to pay the attorney registration fee on behalf of his assistants as part of their compensation, the county may pay the fee if such payment is necessarily incidental to the performance of a function or the exercise of a power conferred upon the county by statute. See Op. No. 82-006.

Part of your second question is whether the county may pay the registration fee required by the Ohio Supreme Court for the judges of the court of common pleas and the county court. The annual salary of judges of courts of common pleas, excluding any portion of the cost for certain health benefits paid on the judge's behalf by a governmental entity, is fixed by the General Assembly, and is payable from the state treasury. R.C. 141.04. Additional compensation is granted to common pleas court judges by R.C. 141.05 (additional compensation based on population), R.C. 141.06 (additional compensation where probate and common pleas courts are combined), and R.C. 141.07 (additional compensation and expenses for holding court in a county in which judge does not reside, payable from the treasury of the county in which the judge holds court). There is no statutory authority, however, for the county to grant compensation in the form of payment of the Supreme Court registration fee for the judges of the court of common pleas.

Concerning the compensation of county court judges, R.C. 1907.081 specifies a fixed sum payable to each judge from the treasury of the county in which the court is situated.⁵ The General Assembly has, however, given the board of county commissioners limited authority to grant additional compensation to county court judges. R.C. 1907.082 states: "In addition to the compensation provided in [R.C. 1907.081], the board of county commissioners may provide for payment of a fixed annual amount, not to exceed two thousand dollars, to each county court judge." Although the county commissioners may authorize the additional compensation described in R.C. 1907.082, there is no specific authority for the county to pay the Supreme Court registration fee on behalf of the judges of the county court. I must conclude, therefore, that a county is without authority to pay the Supreme Court registration fee as part of the compensation of the judges of the county court.

Although the county is without authority to pay the Supreme Court registration fee on behalf of the county prosecutor and the judges of the county court and the court of common pleas as part of their compensation, it is necessary

⁵ Specifically excluded from the term "compensation," for purposes of R.C. 1907.081, is "any portion of the cost, premium, or charge for health, medical, hospital, dental or surgical benefits, or any combination thereof, covering a judge of the county court and paid on his behalf from the treasury of the county in which the court is located."

to determine whether the county may otherwise make such expenditures as a necessary part of a function or power conferred upon the county by statute. I am not aware of any statutorily imposed function or power to which the payment of such fee is necessary. Absent such authority, the county may not pay the Supreme Court registration fee on behalf of the prosecuting attorney or a judge of the county court or court of common pleas under such a theory. However, if the county had authority to pay the Supreme Court registration fee on behalf of judges of the court of common pleas or county court, I believe that Ohio Const. art. IV, §6(B) would prohibit such judges from accepting such payment on their behalf. See 1982 Op. Att'y Gen. No. 82-022.

Your final question asks whether a state agency, with the approval of its appointing authority, may authorize the payment of the Supreme Court registration fee for the agency's staff attorneys.⁶ See generally 1977 Op. Att'y Gen. No. 77-090 at 2-302 ("[t]he term [state agency] is generally used to collectively refer to the various offices, boards, commissions, departments, divisions and institutions created by the constitution or laws of the state for the exercise of any function of state government"). Like a county, a state agency is a creature of statute and the agency and the appointing authority may exercise only those powers expressly granted by statute or necessarily implied from those granted. See Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). It is clear that the salary and fringe benefits of state employees are expressly regulated by statute. R.C. 124.15(A) ("[e]xcept as provided in division (L) of this section [concerning employees of the state school for the deaf and the state school for the blind], all employees working for the state or any of the several departments, commissions, bureaus, boards, or councils of the state shall be paid a salary or wage in accordance with the [schedules of rates set forth in R.C. 124.15]"). 1981 Op. Att'y Gen. No. 81-056; Op. No. 77-090. Under the existing statutory scheme, a state agency has no authority to grant additional fringe benefits to its employees. Op. No. 77-090. See R.C. 124.14(C) (changes in fringe benefits for state employees).

Assuming that a particular state agency is without authority to pay the Supreme Court registration fee on behalf of its staff attorneys as part of their compensation, it is necessary to determine whether such a state agency is otherwise empowered by statute to pay such fee. Since the meaning of the term "state agency" is so broad, it is not possible to discuss the specific statutory powers and duties of each agency. As stated above, however, it is a general rule that, "[e]ach state agency can. . . exercise only such powers as are expressly granted to it or such as are necessarily implied from those granted." Op. No. 77-090 at 2-302. I am not aware of any existing statute which expressly addresses the payment of the Supreme Court registration fee for staff attorneys of a state agency. It is, of course, possible that such a matter may be addressed by subsequent legislation. It is, further, possible that the payment of the Supreme Court registration fee on

⁶ I am assuming that your third question is limited to those instances in which a particular state agency has specific authority to employ persons as attorneys at law, and also to instances in which such persons serve as employees, rather than as independent contractors. See, e.g., R.C. 109.03 (Attorney General may appoint assistant attorneys general, who shall be attorneys at law); R.C. 119.09 (to conduct an adjudication hearing required by R.C. 119.01-119.13, an agency may appoint a referee or examiner who shall have been admitted to the practice of law in Ohio and be possessed of such additional qualifications as the agency requires); R.C. 152.08(A)(6) (Ohio Building Authority may employ attorneys-at-law and fix their compensation). I note that R.C. 109.02 designates the Attorney General as the chief law officer for the state and its departments and provides that "[n]o state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law."

⁷ The impact of Sub. S.B. 133, 115th Gen. A. (1983) (eff. Oct. 6, 1983), concerning collective bargaining rights of public employees, upon the question of state employees' compensation is not considered in this opinion because the act does not become effective until after the Supreme Court registration fee will have been paid.

behalf of staff attorneys may be necessary to the performance of a function or duty imposed upon an agency by an existing statute. If such a case exists, the agency has authority to pay the fee. See, e.g., 1983 Op. Att'y Gen. No. 83-029 (Director of Transportation may establish employee reimbursement scheme if he reasonably finds it necessary to the efficient operation of the Department); Op. No. 77-090 (discussing instances in which parking may be provided without charge by a state agency for its employees).

It is, therefore, my opinion, and you are advised, that:

1. A city may not pay the registration fee required by the Ohio Supreme Court on behalf of the city law director and assistant city law directors unless the legislative authority of the city, in accordance with all applicable provisions of law, enacts an ordinance or takes other legislative action permitting the payment of such fee as part of the compensation of such individuals or authorizing the payment of such fee on the basis that it furthers a municipal public purpose.
2. A city may not pay the registration fee required by the Ohio Supreme Court on behalf of the judges of the municipal court located within the city as part of the compensation of such judges, and Ohio Const. art. IV, §6(B) prohibits the judges from receiving the benefit of the payment of such fees as a perquisite apart from the compensation established by law.
3. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the county's prosecuting attorney as part of the compensation of the prosecutor.
4. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the county's prosecuting attorney as a matter apart from compensation unless the payment of such fee is necessarily incidental to a power or duty imposed upon the county by the General Assembly.
5. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of the judges of the court of common pleas or the county court, and Ohio Const. art. IV, §6(B) prohibits the judges from receiving the benefit of the payment of such fee as a perquisite apart from the compensation established by law.
6. A county may not pay the registration fee required by the Ohio Supreme Court on behalf of assistant prosecuting attorneys unless the county prosecuting attorney authorizes the payment of such fee as part of the compensation of the assistants and such payment falls within the aggregate sum set for the compensation of the assistants, clerks, and stenographers in the prosecutor's office, or unless the payment of such fee is necessarily incidental to a power or duty imposed upon the county by the General Assembly.

⁸ Since a state agency's decision to pay the Supreme Court registration fee on behalf of its staff attorneys involves the expenditure of public funds by a public employer for the benefit of a public employee, several limitations are imposed upon the agency in making its decision. First, if there is any doubt as to the authority of the agency to expend public funds, such doubt must be resolved against the expenditure. Op. No. 83-029. Second, the agency must consider the relationship between the employee's duties and the purpose of the expenditure and determine that the primary benefit will be to the public, rather than to the individual employee. 1946 Op. Att'y Gen. No. 1016, p. 428.

7. A state agency may not pay the registration fee required by the Ohio Supreme Court on behalf of the agency's staff attorneys unless an enactment of the General Assembly specifically authorizes such payment or the payment of such fee is necessarily incidental to a power or duty imposed upon the agency by the General Assembly.