

**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

THE STATE OF OHIO, ex rel
CANDY BOWLING, *et al.*,

Plaintiffs,

v.

MICHAEL DEWINE, in his official capacity as
GOVERNOR of the State of Ohio, *et al.*,

Defendants.

Case No. 21-CV-4469

Judge Michael Holbrook

THE STATE OF OHIO, ex rel
JAMES PARKER, *et al.*,

Plaintiffs,

v.

MICHAEL DEWINE, in his official capacity as
GOVERNOR of the State of Ohio, *et al.*,

Defendants.

Case No. 21-CV-5524

Judge Michael Holbrook

SEBASTIAN NASH, *et al.*,

Plaintiffs,

v.

MICHAEL DEWINE, in his official capacity as
GOVERNOR of the State of Ohio, *et al.*,

Defendants.

Case No. 21-CV-5525

Judge Michael Holbrook

**PLAINTIFFS' COMBINED OPPOSITION TO MOTION TO STAY, AND
MOTION FOR AN ORDER DIRECTING DEFENDANTS TO CARRY OUT THEIR
OBLIGATIONS UNDER THE COURT'S JUDGMENT OF FEBRUARY 12, 2025
FORTHWITH**

Plaintiffs oppose the motion of the State of Ohio, Governor DeWine and Director Damshroeder to stay this Court's order pending appeal and move this Court to order Governor DeWine to immediately take steps to reinstate Ohio's participation in the FPUC program, as ordered in the Court's February 12, 2025 *Order and Entry*, for the reasons set forth in the accompanying memorandum. In order to ensure the Court and opposing counsel have maximum time to review this response, Plaintiffs have filed it before the Court's deadline on Monday.

Respectfully submitted,

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MEMORANDUM

Defendants base their *Motion to Stay Pending Appeal* upon Civ. R. 62. And in regular cases their motion would not be contentious. However, this is not a regular case. This case involves the rights of Plaintiffs to receive unemployment compensation benefits available under both state and federal statute. The nature of rights at issue, and the specific authority granted to the state legislature concerning those rights, renders Civ. R. 62 inapplicable to this case.

A. **Unemployment Compensation Must Be Paid Immediately Upon A Determination of Eligibility Notwithstanding An Appeal.**

Federal law requires that when unemployment benefits are determined to be payable to a beneficiary, the state cannot delay payment of those benefits pending an appeal from that determination. Section 303(a)(1) of the Social Security Act requires that Ohio's coordinating statute contain a provision that is "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503 (a)(1). That required provision was incorporated into Ohio law through R.C. 4141.28(I), which reads:

If benefits are allowed by the director, a hearing officer, the commission, or a court, ***the director shall pay benefits promptly, notwithstanding any further appeal***, provided that if benefits are denied on appeal, of which the parties have notice and an opportunity to be heard, the director shall withhold payment of benefits pending a decision on any further appeal.

R.C. 4141.28(I) (emphasis added). Thus, while the State can appeal this Court's judgment, it cannot use the appeal as a basis to further delay payment of FPUC benefits.

The United States Supreme Court has held that the prompt payment requirement of 42 U.S.C. 503(a)(1) controls over any conflicting state law requirement. *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971). In *Java*, an unemployment compensation applicant was awarded benefits by a state hearing officer. The employer, however, appealed that decision. Under California law, during the pendency of the appeal, the state withheld benefits until the appeal was

decided.

The Supreme Court reasoned that the prompt payment requirement of 42 U.S.C. 503 (a)(1) was intended to ensure that beneficiaries received the benefit of the payments when they need it most—during the time of their actual unemployment. *Id.*, p. 133. And California’s statute that permitted benefits be withheld during an appeal from a determination of benefits frustrated that intent and was invalid. *Id.*, p. 135. The Court held:

We conclude that the word “due” in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that the California procedure, which suspends payments for a median period of seven weeks pending appeal, after an initial determination of eligibility has been made, is not “reasonably calculated to insure full payment of unemployment compensation when due.”

Id., at p. 133. *Java* reaffirmed the Supreme Court’s jurisprudence that a state law that conflicts with provisions of the Social Security Act is invalid and unenforceable. *See, King v. Smith*, 392 U.S. 309, 333 (1968).

Ohio has recognized that *Java* is binding on its payment of unemployment claims. 1971 Ohio Atty.Gen.Ops. No. 71-032 (copy attached). At the time *Java* was decided, Ohio had a provision in its unemployment compensation statutes similar to California’s. Applying *Java*, the District Court for the Northern District of Ohio issued an order enjoining the Ohio Bureau of Employment Services from withholding benefits during an employer’s appeal from an eligibility determination. *Id.*, 2-103. The Administrator of the Ohio Bureau of Employment Services sought an opinion about the retroactive application of the District Court’s injunction, *i.e.* did the injunction

require back payment on claims commenced before the injunction became effective?

The Attorney General opined that just because an employee's immediate need for prompt payment of benefits had passed did not mean the past-due benefits did not have to be paid in full as soon as possible. *Id.*, at 2-105. When the legal barrier to payment ceased to exist, the State was obligated to make the payment immediately. *Id.*, at 2-106, 107. This was true even if the benefits had been improperly delayed and were past due. *Id.*, at 2-106.

Here, the legal impediment to payment of the FPUC benefits was the Governor's decision to withdraw from the FPUC program. This Court's February 12, 2025 *Opinion And Entry* removed that legal impediment. Thus, the FPUC unemployment benefits became "due" upon entry of the *Opinion And Entry*. At that time, 42 U.S.C. 503 and R.C. 4141.28(I) dictate that the payment be made as soon as is administratively feasible. *Java*, at p. 130.

Thus, because 42 U.S.C. 503 governs this matter, to the extent Civ. R. 62 would permit the State to delay fulfilling its prompt payment obligation, the rule is unenforceable.

B. R.C. 4141.28(I) Prevails Over Civil Rule 62.

The State's entitlement to a stay is based exclusively on Civ. R. 62. However, in its *Motion for Stay Pending Appeal*, the State does not discuss whether Civ. R. 62 actually applies to this case. Because of the special nature of the controlling statutory provisions involved in this case, Civ. R. 62 should not be applied. The circumstances here involve the Court enforcing an order for equitable relief, rather than Plaintiffs acting as judgment creditors seeking to execute on a money judgment.

First, the Civil Rules may not abridge or modify substantive rights. Second, Civ. R. 62 cannot control the enforcement of a statute enacted pursuant to Article II, Section 34 of Ohio's Constitution.

1. R.C. 4141.28(I) provides a substantive right.

Article IV, Section 5(B) of the Ohio Constitution, adopted through the Modern Courts Amendment, states in part:

The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, ***which rules shall not abridge, enlarge, or modify any substantive right.*** * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Art. IV, Sec. 5(B) (emphasis added). “The Amendment, along with Civ. R. 1(A), recognizes that where conflicts arise between the Civil Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law.” *Boyer v. Boyer*, 46 Ohio St. 2d 83, 86, 346 N.E.2d 286 (1976).

As used in Art. IV, Sec. 5(B):

“Substantive” means that body of law which creates, defines and regulates the rights of the parties. (See Black’s Law Dictionary.) The word substantive refers to common law, statutory and constitutionally recognized rights. Whether this lack of consent to suits against the state is viewed as a defense or as a right of the state, i.e., the right not to be made a party defendant without its consent, it falls within that body of law traditionally denominated substantive. It both defines and regulates the rights of parties.

Krause v. State, 31 Ohio St. 2d 132, 145, 285 N.E.2d 736 (1972).

It cannot be disputed that Ohio’s unemployment compensation program creates substantive rights that did not exist at common law. Ohioans’ right to those benefits are created, defined, and regulated by statute—both federal and state. And as set forth in R.C. 4141.28(I), part of that right is to receive payment of unemployment compensation benefits promptly after a court renders a determination of entitlement to those benefits.

In its *Order And Entry*, this Court stated: “There is no question that plaintiffs were eligible for FPUC benefits at the time defendants terminated its FPUC termination [sic].” *Order And Entry*, p. 10. The Court went on to state “there is also no question of fact and that plaintiffs are entitled

to a writ of mandamus restoring Ohio's participation in the FPUC program and resulting benefits as a matter of law." *Id.*, p. 11. In other words, this Court's *Order And Entry* constitutes a determination that Plaintiffs were entitled to receive the available FPUC benefits after the State withdrew from the program.

Pursuant to R.C. 4141.28(I), the State is under an affirmative statutory duty to immediately pay those benefits notwithstanding its appeal. The State cannot rely on a Civil Rule of Procedure to curtail Plaintiffs' substantive statutory right to prompt payment.

2. Because it was enacted pursuant to Article II, Section 34 of the Ohio Constitution, R.C. 4141.28(I) prevails over the Civil Rules

Even if Civ. R. 62 were generally applicable to this case, it must yield to R.C. 4141.28(I). The General Assembly enacted Ohio's unemployment statute pursuant to the power granted to it by Art. II, Sec. 34 of the Ohio Constitution. *State v. Iden*, 71 Ohio App. 65, 70-71 (Muskingum Co. 1942). That section reads:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; ***and no other provision of the constitution shall impair or limit this power.***

Ohio Const. Art. II, Sec. 34 (emphasis added). "The authority vested in the General Assembly by Article II, Section 34 to pass laws advancing employees' comfort and general welfare therefore includes laws providing for the assistance, support, well-being, and prosperity of Ohio's working people." *City of Cleveland v. State*, 157 Ohio St. 3d 330, 335, 2019-Ohio-3820, ¶ 23. "We have described the language used in Section 34 as 'so clear and unequivocal that resort to secondary sources, such as the constitutional debates, is actually unnecessary. * * * [I]t is the duty of courts to enforce the provision as written.'" *Id.*, ¶ 20 (*quoting Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 15, 539 N.E.2d 103 (1989)").

Like R.C. 4141.28(I), the Civil Rules were promulgated pursuant to a Constitutional

provision. Therefore, we are confronted with competing constitutional provisions applicable to the case. But the plain language of Article II, Section 34—that “no other provision of the constitution shall impair or limit” the legislature’s authority over workers’ welfare—resolves that conflict in favor of the General Assembly. R.C. 4141.28(I) requires prompt payment of unemployment benefits. And because it was enacted pursuant to the express authority granted the General Assembly by the citizens of Ohio in Article II, Section 34, that statute must be enforced without regard to the Civ. R. 62.

C. The Court May Issue Orders to Maintain the Status Quo Pending Appeal.

Even if a stay is required under Civ. R. 62, the Court possess the authority to issue additional orders to maintain the status quo during the pendency of the appeal.

This Court granted relief to Plaintiffs in the form of injunctive relief and mandamus to require the State to reinstate its participation in the FPUC program. That order was premised on representations by the Department of Labor that the funds remained available for disbursement to the State. Since then, however, the nation has held a presidential election and the country’s fiscal affairs are, to say the least, in flux.

Therefore, time is of the essence to secure the funds at issue in this litigation before they are gone. Republican members of Congress have publicly expressed their intent to use unspent pandemic emergency money for other causes.¹ Because Republicans now control the U.S. House

¹ See Catie Edmondson and Madeleine Ngo, House G.O.P. Eyes Rescinding Unspent Covid Money as Part of its Fiscal Plan, THE NEW YORK TIMES, <https://www.nytimes.com/2023/04/20/us/politics/republicans-unspent-covid-money-debt-limit.html>, April 20, 2024 (“House Republicans demanding spending cuts in exchange for raising the nation’s debt limit have rallied around a seemingly straightforward proposal: recalling billions of dollars in coronavirus relief funds that Congress approved but have not been spent.”); see also Sarah Bedford, House Republicans Seriously Weigh Clawing Back Unspent Pandemic Funds, WASHINGTON EXAMINER, <https://www.washingtonexaminer.com/news/2779897/house-republicans-seriously-weigh-clawing-back-unspent-pandemic-funds/>, February 14, 2023 (“House

of Representatives, U.S. Senate, and the Presidency, the State of Ohio needs to act now to secure the unused FPUC funds before those funds are recalled and used for other purposes. In addition, Committees in the United States House and Senate have begun marking up a budget resolution that is likely to include reappropriation of unspent pandemic relief funds.²

The Court system should not be a tool of political gamesmanship. And although the State undeniably has the right to appeal, its doing so should not be permitted to run the clock out on the relief this Court has granted. To preserve the availability of the remedies it has granted, the Court should direct the State to expeditiously start the process of reinstating Ohio’s participation in the FPUC program. Only by requiring the State to take some affirmative action to preserve access to the FPUC funds held by the Department of Labor can the status quo be preserved.

When she sat on this Court, Justice Brunner considered a similar situation. In *Monarch Constr. Co. v. Ohio Sch. Facilities Comm’n*, 2002-Ohio-2957 (Franklin Ct. Com. Pl.), the Court found that a school district’s contract with a construction company to be void. The district was also enjoined from allowing the construction company to continue work on the project. The district and the Ohio Schools Facility Commission appealed the decision and sought a stay pending appeal, which all parties agreed had to be granted. The question presented was whether the stay pending appeal permitted the construction company to continue working on the project during the pendency of the appeal. The Court said “no.”

“[T]he effect of a nondiscretionary stay pending appeal pursuant to Civ.R. 62 should not be to undo the trial court’s injunction before it can be determined by a higher court whether it was

Republicans are seriously weighing a push to claw back pandemic relief funding as they debate what spending cuts they’ll demand in exchange for their support in lifting the debt ceiling.”).

² <https://www.cbsnews.com/news/house-republicans-budget-plan-senate-competing-proposal/> last checked February 13, 2025 at 8:29 p.m. eastern.

issued wrongfully.” *Id.*, ¶ 13. While a stay pending appeal had to be granted, “without further order, the effect of the stay is unclear and could operate inconsistently with the need to preserve the status quo. Based on *Hamilton [v. Fairfield Twp.* (1st Dist. 1996), 112 Ohio App. 3d 255], the court believes that it may issue an appropriate order to preserve the status quo until such time as the appellate court can consider the matter pursuant to Civ.R. 62(D).” *Id.*, ¶ 10.

In this instance, the status quo includes the availability of the FPUC funds from the Department of Labor. A stay pending appeal imperils the availability of those funds because of the change of administration in Washington. In order to preserve the judgment for Plaintiffs, and safeguard the ultimate remedy ordered by this Court, the State should be ordered to take some affirmative action to notify the Department of Labor of the situation and take at least initial steps to secure the FPUC funds. By doing this, the Court will ensure that, if the Court of Appeals rules in Plaintiffs’ favor and affirms this Court’s *Order and Entry*, the FPUC funds will be available for Plaintiffs and Class members. If, however, the Court of Appeals ultimately rules in favor of the State, the FPUC funds can be returned to the federal government. Only by doing so can the Court preserve the status quo during the appeal.

D. Conclusion.

For the foregoing reasons, Plaintiffs ask the Court to deny the State’s Motion to Stay Pending Appeal and require the State to immediately seek Ohio’s reinstatement to the FPUC program as ordered in its *Order And Entry*. In the alternative, should the Court grant a stay, Plaintiffs ask that the Court also issue an order requiring the State to take appropriate steps to reinstate participation in the FPUC program and hold the funds pending resolution of the appeals process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2025 a copy of the foregoing was served by email to Ann.Yackshaw@Ohioago.gov and Julie.Pfeiffer@OhioAGO.gov.

/s/ Marc E. Dann
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OPINION NO. 71-032**Syllabus:**

By the injunction Order of the Federal District Court, Northern District of Ohio, Western Division, the Bureau of Employment Services is restrained from withholding unemployment benefits as a result of employer appeals from initial determinations by the Administrator on (1) applications for determination of benefit rights and (2) first and initial claims when the Administrator has allowed benefits by such initial determinations, regardless of whether such initial determinations were made prior or subsequent to the date of such injunction Order.

**To: William E. Garnes, Administrator, Ohio Bureau of Employment Services,
Columbus, Ohio**
By: William J. Brown, Attorney General, June 16, 1971

I am in receipt of your request for my opinion which you phrase in the following manner:

"1. What is the effective date that I shall use in processing current allowed claims, when appeals are filed under Sections 4141.28 (G) and (H), Revised Code?

"2. Is this Order applicable to allowed claims subsequently appealed under Sections (G) and (H), and/or appeals were pending either prior to May 12, 1971, or the effective date you establish? If this Order applies to said claims, what effective date shall I apply for the payment of benefits on the prior claims?"

The questions arise from two recent judicial decisions, interpreting the law of unemployment compensation. In California

Department of Human Resources Development v. Java, No. 507, October Term, 1970, decided April 26, 1971, The Supreme Court of the United States considered provisions of California statutes, similar to those of Ohio, under which unemployment benefits were required to be withheld from a claimant during the pendency of an appeal from an initial administrative determination awarding him such benefits. Such provisions were held to be in conflict with the requirements of Section 303 (a)(1) of the Social Security Act, 42 U.S.C. §503 (a)(1) (the enabling and governing federal law), providing that benefits must be paid "when due". The Court said:

"We conclude that the word 'due' in §303 (a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment."

During the pendency of Java, an action was filed in the United States District Court, Northern District of Ohio, Western Division, against the Bureau of Employment Services, the Administrator and others, raising similar issues with respect to Ohio law and particularly the provisions of Section 4141.28 (G) and (H), Revised Code. Denominated Foard v. Ohio Bureau of Employment Services, et al., No. C-70-302, the matter was tried to a three-Judge District Court and was decided on May 12, 1971. That Court found the plaintiff's claim to be a class action, pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure, and to present "the exact issue which was recently decided by the Supreme Court" in Java. Accordingly, it issued an injunction against the Administrator, the Order being phrased as follows:

"FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their agents, successors, assigns and all persons in active concert and participation with them be and the same are ENJOINED from in any way enforcing those requirements of Section 4141.28 (G) and (H) of the Ohio Revised Code that provide for withholding of payments on appeal after an initial award of benefits."

Divisions (G) and (H) of Section 4141.28, supra, affected by the Order, are respectively in pertinent part as follows:

"(G) Any interested part notified of a determination of an application for determination of benefit rights or a claim for benefits may, within ten calendar days after such notice was delivered to such person or was mailed to his last known post office address, apply in writing for reconsideration of the administrator's or deputy's determination, and the payment of future benefits affected by such application shall be withheld pending the decision upon reconsideration.

" * * * * *

"(H) Any interested party may appeal the

administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within ten calendar days after such notification was delivered to such person or was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith. If an appeal is filed, payment of benefits which are in dispute shall be withheld pending the decision on the appeal; * * *."

By your first question, I conclude you have no question concerning the substance of the Order in Foard but, rather, are inquiring with respect to certain of the legal-administrative implications thereof. Those implications are confined by your question to the consequences that may attach to the dates on which initial determinations were made, i.e., whether preceding May 12, 1971 (the date of the Order) or afterward.

Several types of determinations made by the Bureau are potentially affected by the injunction Order. These may be characterized briefly as determinations on (1) applications for determination of benefit rights (Sections 4141.01 (D); 4141.28 (C), Revised Code); (2) first and additional claims for benefits (Sections 4141.01 (C), (E) and (F); 4141.28 (D) (1), Revised Code; and (3) continued claims (Sections 4141.01 (C) and (E); 4141.28 (D) (2), Revised Code). In each case the Administrator is required to make a determination as to a claimant's eligibility for benefits (Sections 4141.28 and 4141.29, Revised Code). In each case, affected employers may apply for administrative reconsideration of such determination; and, except in unusual situations in which the reconsideration step may be passed over, either party aggrieved by the decision on reconsideration, may then appeal to a referee (see Divisions (G) and (H) of Section 4141.28, supra, quoted above).

The determination of "benefit rights" pertains primarily to the amount of weekly benefits and the total amount of benefits to which, potentially, a particular claimant may be entitled as a result of his employment history during the preceding year (Section 4141.01 (D), supra), customarily known as a "monetary" determination. Determination of a first or additional claim pertains primarily to a claimant's basic eligibility for benefits during any part of the period of his unemployment, in light of the circumstances under which he became unemployed, e.g., was unemployment due to discharge for just cause, a disqualification, or for simple lack of work (Section 4141.29 (B) and (D) (2), supra). Determination of a continued claim pertains primarily to a claimant's eligibility for benefits for a particular week of unemployment, involving a question, for example, of whether or not one was "actively seeking suitable work", a condition that a claimant might fail to meet in one only of several weeks of unemployment (Section 4141.29 (A) (4), Revised Code).

Both Java and Foard were concerned solely with the first or additional claim determination. There would appear to be no substantial reason, however, to differentiate between an application for determination of benefit rights and such first or additional claim, in as far as the withholding of benefits is concerned where benefits are allowed initially. The notice of the claimant's filing, sent to the employer, affords the employer opportunity to present his views on both issues, i. e., the "monetary" and the reason for unemployment (Section 4141.28 (B) (1), supra). It is that notice and opportunity

to present employer evidence and views, administratively, that the Court in Foard found to satisfy the test prescribed in Java. Since an employer appeal from either determination would cause payment of benefits to be withheld under the statute, it would seem that both types of determination are affected by the Order.

As to the continued claim procedure, however, a different set of problems may be involved. I do not understand your questions to relate to that procedure, probably because the great bulk of determinations in that category are routine. Accordingly, but without implication, one way or the other, I shall not address myself to that procedure. My opinion will be confined, therefore, to the "monetary" and first and additional claim procedure but, for simplicity, I will discuss the latter type of determination only.

As stated above, your questions pertain to two basic groups of claimants potentially affected by the injunction Order in Foard, (1) those on whose claims the initial determination was made on or after May 12, 1971, the date of the Order, and (2) those on whose claims the initial determination was made prior to such date.

There can be no question that the Order applies to the first group, i.e., those decided initially on and after May 12, 1971. To hold otherwise would be to vitiate the substance of Foard and to violate the express requirements of the Order.

As to the second group, those decided initially prior to the date of the Order, a more difficult question is involved. The Order is effective as of the date it was journalized (Rule 62. (a) of the Federal Rules of Civil Procedure). It restrains the Administrator, from that day forward, from enforcing certain provisions of the statutes of Ohio. It does not expressly purport to affect past transactions. Indeed, in Java, later lump sum payment of benefits was said not to serve the purpose of the law which was intended to alleviate, in part, the immediate hardships of job loss and the consequent adverse economic force of reduced purchasing power. It might be argued from the foregoing considerations that past transactions are not affected by the Order because (a) it does not purport to speak retroactively and (b) a current lump sum payment could not make up for the hardship and adverse economic effects already suffered. In the latter connection it can also be argued that such payments might well become a vain thing in that they are in various stages of progress toward final decision on the merits, some, no doubt, only a few days or weeks away from a final order. It is also conceivable that the entire lump sum amount could become repayable to the fund as a result of such final order.

On the other hand, it is necessary, of course, to give full effect to the judicial decisions without injecting undue technicality. In Foard, the Court was dealing with a named plaintiff whose benefits were withheld because of employer appeal from an initial determination in plaintiff's favor. Such withholding had occurred prior to the filing of the plaintiff's Complaint. While the plaintiff was held to represent a class, there could be no question but that the Court was confronted, after the decision in Java, with remedying an error of law suffered by the plaintiff. That error lay in failure to pay benefits "when due", i.e., when claimed following the Administrator's initial determination in plaintiff's favor. To restrict the Order in the case to the period of time following the date of its journalization would deprive the plaintiff of the remedy that was the essence of her Complaint. Indeed, such interpretation would make the Court's decision into an advisory opinion only, one appli-

cable in the future to a wide variety of potential claimants; not a decision immediately dispositive of the rights of an ascertainable group of claimants. (The foregoing, in my opinion, remains true notwithstanding the disposition, in other proceedings prior to the date of the Order involved here, of the merits of the plaintiff's individual claim.)

Consideration of the statutory provisions together with the wording of the Order leads to the conclusion, suggested in the preceding paragraph, that claims decided initially prior to the date of the Order must be paid as "due", even though delay has occurred and caused them to be past due. Sections 4141.28 (D) (2) and 4141.30 (B) and (C), supra, require benefits to be paid weekly when found by the Administrator to be properly claimed. In pertinent parts, these are as follows:

Section 4141.28 (D) (2) :

"The administrator or his deputy shall also examine each continued claim for benefits filed, and on the basis of any facts found by him shall determine whether such claim shall be allowed. If such claim is disallowed the administrator shall notify the claimant of such disallowance and the reasons therefor. If the claim is allowed and benefits are paid, the administrator shall promptly send notification of such payment of benefits to the employer to whose account benefits will be charged. This notification shall be for information only and shall not be appealable, and the notification shall so indicate."

Section 4141.30 (B) and (C) :

"(B) Benefits are payable to each eligible and qualified individual on account of each week of involuntary total unemployment after the specified waiting period at the weekly benefit amount determined by:

* * * * *

"(C) Benefits are payable to each partially unemployed individual otherwise eligible on account of each week of involuntary partial unemployment after the specified waiting period in an amount equal to his weekly benefit amount less that part of the remuneration payable to him with respect to such week which is in excess of twenty percent of his weekly benefit amount, and the resulting amount increased to the next higher even multiple of one dollar."

The only statutory authorization or direction to withhold actual payment in these circumstances are the above quoted provisions of Section 4141.28 (G) and (H), supra, that apply when an appeal from such determinations is filed. Those provisions directing withholding, however, are the ones the Administrator is restrained from "enforcing". To that extent the Order constitutes an excision of statutory language so that the requirements to pay, contained in Sections 4141.28 (D) (2) and 4141.30 (B) and (C), supra, are now operative without such superseding bar. Without the bar to payment,

there is no legal basis for refusal to pay. Such continuing refusal could not be premised on the past withholding of payment under color of statutory direction because, to do so, would constitute a present and on-going "enforcement" of provisions the Administrator is now restrained from "enforcing". I must conclude therefore that both groups must be treated similarly and benefits be paid to claimants otherwise eligible, regardless of the date on which the initial determination in their favor was made.

In specific answer to your questions, it is my opinion and you are advised that by the injunction Order of the Federal District Court, Northern District of Ohio, Western Division, the Bureau of Employment Services is restrained from withholding unemployment benefits as a result of employer appeals from initial determinations by the Administrator on (1) applications for determination of benefit rights and on (2) first and initial claims when the Administrator has allowed benefits by such initial determinations, regardless of whether such initial determinations were made prior or subsequent to the date of such injunction Order.