

## **Opinion No. 62-24**

January 31, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Boston E. Witt, First Assistant Attorney General

**TO:** Mr. K. D. Spiller, Chief, Budget and Financial Control, Department of Finance and Administration, Santa Fe, New Mexico

### **QUESTION**

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1. Can teachers' salaries be reduced from the amount stipulated in the contractual agreement?
2. When teachers' salaries have been partially paid on the basis of one-twelfth per month or less, relative to a nine-month contract, may correction legally be made during the term of said contract, adjusting to a one - ninth total payment per month salary basis without constitutional or statutory violation?
3. In the light of official payroll voucher format and procedures as established by statute and with regard to the certification required on each such payroll voucher, should deferred payroll payments be considered as incorrect or illegal payments?
4. Should the answer to question No. 3 consider such payments as incorrect but not illegal, may such incorrect payments be corrected at a later date?
5. Does the present format of the standard state payroll voucher (copy attached) and does the present phrasing of the certification on the face thereof legally preclude partial or deferred payments for services enumerated within the payroll voucher as having been performed during or within the stated pay period?
6. Should the answer to question No. 5 be in the negative, what changes in format and/or certification will be required to effectively preclude such purchase (partial?) or deferred payments?

#### **CONCLUSIONS**

1. See analysis.
2. Yes.
3. See analysis.

4. Yes.
5. No.
6. See analysis.

## **OPINION**

### **ANALYSIS**

You have submitted to us along with your opinion request a copy of the Teacher Contract used by the Girls' Welfare Home from whence the problem arose. It should be pointed out, however, that the questions raised in your letter are common to all teacher contracts in all school districts. This problem normally arises because some teachers prefer to be paid one-twelfth of their total salary over a twelve-month period even though they are actually engaged in teaching during nine months of the year. It is our understanding that past custom has allowed this procedure because many teachers have been improvident in the use of their funds when paid to them on a nine-month basis and have consequently found themselves with no source of income the remaining three months of the year. The question frequently arises also from the fact that a teacher draws one-twelfth of his salary for nine months and then at the end of the ninth month or end of school requests that the remainder of the remuneration due him be paid to him in a lump sum.

We would first point out that the school at the Girls' Welfare Home is in fact treated as a school district and participates in the public school equalization fund. See Sec. 63-7-46.1, N.M.S.A., 1953 Compilation (PS).

The Teacher Contract used by the Girls' Welfare Home which is attached hereto, provides that the teachers shall teach in the Girls' Welfare Home high school for a term of nine months for a total amount of consideration, and further provides that such sum shall be paid in equal amounts in semi-monthly installments on the 15th and last day of each month. It makes the provisions of the contract subject to the Teacher's Tenure Law, etc.

In answer to your first question, we are of the opinion that the total remuneration set forth in the contract cannot be reduced unilaterally by the State institution. As is true with all contracts, however, the total amount of remuneration due can be reduced by mutual consent of the parties. If, by your first question, you mean whether the teachers' monthly salary payments can be reduced to one-twelfth or less of the total amount due from one-ninth of the total amount due, we point to Section 73-12-4, N.M.S.A., 1953 Compilation, which provides that the salary per month shall be computed and paid on the basis of the months school is actually taught in the district during the term, so technically the institution could not unilaterally or by mutual agreement with the teacher agree to pay an amount less than one-ninth of the total amount due each month without being in technical violation of the statute. (assuming a 9 month school term).

This leads us to your second question wherein you have asked whether adjustments can be made where a teacher has received less than one-ninth of his total contract compensation monthly during the nine-month period and now desires to have the deferred amount paid to him. As we have pointed out above, we feel that the institution may have been in technical violation of the statute in allowing a teacher to receive less than one-ninth of his total salary per month for the nine-month period; however, we feel that there is no legal prohibition against adjusting this monthly payment so that the total amount contracted for is paid by the end of the school term. We deem this to be true inasmuch as the State has contracted affirmatively to pay a teacher a total amount of compensation under the contract for services rendered over a nine-month period. The fact that the institution may have been technically violating the statute by paying something less than what was due on a monthly basis certainly should not relieve the State nor a school district from their responsibility to comply with the contract and pay the teacher his total compensation earned.

As regards your third question we feel such partial or deferred payroll payments, while technically incorrect, are not in our judgment illegal payments inasmuch as the State is primarily obligated to pay the total compensation due under a teacher contract apart from the question of whether the institution violated the statute by paying something less.

Since we are of the opinion that these payments are technically incorrect but not illegal, we are of the opinion that these incorrect payments may be corrected at a later date on the same rationale as above where we indicated that the State's primary responsibility under a contract is to pay the total compensation due for services.

Also attached to your request was a salary or payroll voucher which you have submitted for our consideration. We have read the wording thereon with care and conclude that the phrasing and certification thereon do not preclude these partial or deferred payments for the services enumerated within the payroll voucher. The voucher on its face indicated that the amount paid is for services rendered during any certain month. This is not the case where moneys have been paid to teachers before it is earned. In this instance something less than what is due is being paid, and, therefore, there is no violation of the wording in the voucher since the money being paid is in fact for the services rendered during that period. As regards subsequent deferred payments, the deferred payments are in truth and in fact for services rendered for a period of time within a total nine-month school term, and, therefore, we believe there is no violation with this wording as regards these payments.

As regards the certification on the bottom of the face of the voucher, all that certification indicates is that the persons therein named are legally entitled under the Constitution and statutes to receive the compensation stated therein, which, in fact they would be, having performed the services they had agreed to perform under the contract. It provides additionally that the services had been performed as stated in the above account. This, we feel, would have been met also in the case of either partial or deferred payments. It further provides that they were necessary and proper and that

they were just, reasonable and as agreed, and that no part had been previously paid. We find no prohibition against partial or deferred payment in these words since they were necessary and proper under the contract and they were just, reasonable and as agreed under the contract since the State had agreed to pay a total compensation to the teacher and that no part of the amount in any individual voucher had been previously paid. This obviously was pointed to the case of a duplicate payment. So we conclude that the phrasing in the certification on the face of the voucher does not preclude payment of partial or deferred compensation under a teacher's contract.

In question No. 6, you ask what language could be used on the voucher to preclude such partial or deferred payments. We would suggest that the certification be amended to read as follows:

"I certify that the within named persons are legally entitled under the Constitution and statutes of New Mexico to receive the compensation stated herein; **and that the compensation stated is the total compensation due and owing these persons for the services that have been performed as stated in the above account;**<\*\*\*>"

This would put the burden upon the certifying officer of the institution paying to pay the total amount due the teacher in any one month of the school term since he would have to certify that this was the total amount due the person. We do not pass on the advisability of following this procedure since it is not within our scope to make these executive decisions but to merely pass on the legality of them and the question of whether teachers should be prevented from receiving their salaries on a twelve-month basis is not a decision for this office.