

Opinion No. 62-28

February 5, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

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

QUESTION

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1. May monthly salaries of Miners' Hospital employees legally be increased effective August 1, 1961, at any date subsequent to August 31, 1961?
2. May salary increases or decreases legally be made effective on any date prior to the first day of the calendar month in which such adjustments are formalized?
3. In the event that illegal retroactive salary increases have been paid, against whom should recovery action be taken?

CONCLUSIONS

1. No.
2. Yes, under certain limited situations.
3. Against the recipient.

OPINION

ANALYSIS

The answer to your first question is contained in Article IV, Section 27 of the New Mexico Constitution, which provides as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor **after services are rendered or contract made.. .**" (Emphasis added.)

If the legislature itself is precluded from granting retroactive salary increases, it naturally follows that so too are all agencies, departments or institutions of State government.

We have no issue here as to the scope of fiscal control that the Department of Finance and Administration can exercise over the constitutionally created Miners' Hospital. Rather, we are dealing with an express constitutional provision which must be complied with by every branch or division of State government.

The same issue here presented arose twice during 1957, and this office held, correctly we believe, that pay increases cannot be granted in regard to services already rendered. Opinion No. 57-17 and Opinion No. 57-308. In this connection, the latter opinion noted that since services rendered by public servants are on a monthly basis, a pay increase can be made effective as of the first day of the month in which the services are rendered and the increase is approved, i.e., pay increase approved January 30, 1962 could have been made effective as of January 1, 1962.

Consequently, the monthly salaries of Miners' Hospital employees could not legally be increased effective August 1, 1961, at any date subsequent to August 31, 1961. The same result has almost invariably been reached by the courts when dealing with similar or identical constitutional provisions. See **Field v. Williams**, 34 Ohio St. 218; State ex rel., **Haberlan v. Love**, 89 Neb. 149, 131 N.W 196; State ex rel., **Eshelman v. Cheetham**, 21 Wash. 437, 58 Pac. 771; **Gubler v. Utah State Teachers' Retirement Board**, 113 Utah 188, 192 P.2d 580.

The issue presented by your second question was also involved in the factual situation dealt with in Opinion No. 57-205. In that case a pay increase which violated no statutory provision had been authorized by the head of the agency. Due to reliance on an erroneous directive issued by the State Budget Division, the disbursing officer refused to honor the increase. This office held that the increase was **effective as of the date it was authorized by the agency head** and the fact that it was not honored for some time thereafter by the disbursing officer did not have the effect of making the increase operate retroactively in violation of Article IV, Section 27.

The answer to your third question is that if illegal retroactive salary increases have in fact been made, the public moneys so paid should be recovered back from the recipients thereof. After considerable research, we have determined that this is the almost universal rule applied by the courts. **State v. McCarty**, 76 Idaho 153, 279 P. 2d 879; **Heidt v. United States**, 56 F.2d 559; 70 **C.J.S., Payment**, Section 156.