

## Opinion No. 71-44

March 10, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. Arthur L. Ortiz State Personnel Director State Personnel Office 130 South Capitol Santa Fe, N.M. 87501

### QUESTIONS

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If one or more incumbents of a class in an agency have their ranges neither raised or lowered, as the case may be, due to clerical error in the agency, can this adjustment be made "retroactive" to the date on which the action was taken for the other employees **in that class in the agency?**

#### CONCLUSION

Yes.

### OPINION

#### {\*62} ANALYSIS

State Personnel Board Rule 302.9, Salary Upon Change of Range of a Class, states as follows:

"a. When a class is assigned by Board action to a higher range, the salaries of all incumbents of the class may be adjusted to the same step in the new range as they occupied in the old range, or they may all be adjusted to any lower step in the range, provided that the resulting salary shall be at least one (1) step greater than the previous salary, and **provided that within each individual agency the adjustments shall be uniform.**" (Emphasis added.)

Due to a clerical or administrative error the underlined portion of the above rule was not complied with.

What is involved in your question is Article IV, Section 27 of the New Mexico Constitution which provides that "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor **after services are rendered** or contract made." See Attorney General Opinions 57-17, 57-308, 62-28 dealing with the prohibition against retroactive pay increases.

The above constitutional provision precludes the legislature itself from granting retroactive salary increases; clearly then the agency, department, commission, etc., cannot grant them.

The situation here though is much like that dealt with in Attorney General Opinion No. 57-205. The fact that the opinion was written prior to enactment of the State Personnel Act does not alter the correctness of both its reasoning and conclusion. In 1962, after the State Personnel Act was in effect, we referred to Opinion 57-205 with approval, stating:

"In that case [the one covered by the Opinion] 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."

We have an even more compelling reason here why backdating these salary increases to the proper date is not the type of retroactivity that is prohibited by the constitution. In this case the increase was required by State Personnel Board rules. The fact that through someone's error they were not granted cannot be allowed to negate your duly authorized rules. It is fortunate that these mistakes are the type which can and must be corrected if your rules are to have any force and effect.

By: Oliver E. Payne

Deputy Attorney General