

**April 16, 2013 Advisory Letter--Opinion Request - Settlement Agreement between
New Mexico State University and Barbara Couture, D.A.**

The Honorable William R. Rehm
New Mexico State Representative
Box 14768
Albuquerque, NM 87191

Re: Opinion Request - Settlement Agreement between New Mexico State University and
Barbara Couture, D.A.

Dear Representative Rehm:

You have requested an opinion concerning the settlement agreement between New Mexico State University (hereinafter "NMSU" or "University") and former NMSU President Barbara Couture (hereinafter "Dr. Couture"). Specifically, you asked whether NMSU's proposed payment to Dr. Couture, as part of a recently negotiated settlement agreement, violates Article IX, Section 14 of the New Mexico Constitution. Second, you asked whether the same agreement violates Article IV, Section 27 of the New Mexico Constitution. Based on our examination of the relevant New Mexico constitutional provisions and case law, as well as on the information available to us at this time, we do not believe that this agreement violates either constitutional provision.

The relevant background facts are as follows. In November 2009, the NMSU Board of Regents entered into an employment contract (hereinafter "Contract") with Dr. Couture for the position of University President. The Contract provided, in pertinent part, that Dr. Couture was to serve as president of the University for a term of five years, commencing on January 1, 2010, and terminating on December 31, 2014. If, at the end of the five years, Dr. Couture was still employed as the University President, she was to receive a \$500,000.00 retention bonus. See Contract, Section 5. The Contract also provided that Dr. Couture was to hold the "faculty rank of Professor with tenure" upon approval of the "appropriate department and the College of Arts and Sciences."¹ See Contract, Section 10.1. Furthermore, Section 13 of the Contract enumerated the five circumstances under which the Contract could be terminated, which were as follows: (1) mutual agreement of the parties; (2) resignation by the president; (3) mental or physical incapacity of the president; (4) death of the president; or (5) termination for just cause.

On Monday, October 1, 2012, the NMSU Board of Regents met to approve the Settlement Agreement and Release of Liability (hereinafter "Settlement Agreement") reached between Dr. Couture and the University. In their motion to approve the settlement, the Regents explained that the agreement had been reached pursuant to Section 13.1 of the Contract, which allowed for the Contract's termination by mutual agreement. The Settlement Agreement stated, in relevant part, that the parties wished to mutually terminate Dr. Couture's Contract. It also stated that the parties agreed that Dr. Couture would submit a Notice of Resignation and agree to be placed on administrative leave until December 31, 2012, which was her last day of employment.

See Settlement Agreement, Section 1. Of particular interest to your inquiry, the Settlement Agreement also stated that Dr. Couture was to receive a lump sum payment in the amount of \$453,092.72 no later than January 15, 2013. See Settlement Agreement, Section 2.

1. Whether NMSU's payment to former President Barbara Couture as part of a settlement agreement violated Article IX, Section 14 of the New Mexico Constitution.

The anti-donation clause of Article IX, Section 14 states, in pertinent part:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....

The New Mexico Supreme Court has defined the term "donation" in Article IX, Section 14 according to its "ordinary sense and meaning" as "a gift, an allocation or appropriation of something of value without consideration to a person, association or public corporation." Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920, 926-27 (1956) (internal quotation marks omitted). Any form of state aid to an individual will violate the anti-donation clause when the aid has the "character of a donation in substance and effect". State ex rel. Office of the State Eng'r v. Lewis, 2006-NMCA-08, 49, 141 N.M. 1, 150 P.3d 375 (internal quotation marks omitted). New Mexico courts have found violations of this constitutional provision when there was inadequate consideration given for the state's aid. Cf. Treloar v. County of Chaves, 2001-NMCA-74, 130 N.M. 794, 32 P.3d 803 (holding that there was no violation of the anti-donation clause when money paid by the state, in the form of severance benefits, was "in the nature of wages that have been earned;" thus, "consideration had been given for the severance obligation, and there was no gift").

In this case, where the lump sum payment was offered as part of a contract for settlement, consideration is also a requirement for the contract's enforceability. See Branch v. Chamisa Dev. Corp., 2009-NMCA-131, 33, 147 N.M. 397, 223 P.3d 942 (explaining: "[A] settlement agreement is a species of contract" (internal quotation marks and citations omitted).). Like any contract, a settlement agreement "must possess mutuality of obligation," meaning "both sides must provide consideration." Board of Educ. v. James Hamilton Constr. Co., 119 N.M. 415, 420, 891 P.2d 556, 561 (Ct. App. 1994). Consideration is defined as a "promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do." Heye v. American Golf Corp., 2003-NMCA-138, 12, 134 N.M. 558, 80 P.3d 495 (citing Restatement (Second) of Contracts §§ 73, 74, at 179, 185 (1981)). Furthermore,

[f]orbearance to exercise a legitimate right or claim is also sufficient consideration to support a settlement, and thus a compromise agreement is supported by a party's forbearance from initiating a lawsuit ... as well as forbearance from

seeking an award of litigation costs. It is not the potential recovery in a lawsuit that provides consideration in a settlement, but rather the right to pursue the recovery.

15 Am. Jur. 2d Compromise and Settlement § 19.

In a letter addressed to the Attorney General's Office, Mr. Bruce Kite, NMSU's general counsel, explained that the settlement was reached "[i]n order to avoid protracted legal conflict" and that "termination of the employment relationship by mutual agreement was the most effective and efficient manner in which to address the disputed personnel matter." Mr. Kite also explained that Dr. Couture's Contract was properly terminated under Section 13.1, which allows for termination by mutual agreement of the parties. He contends that the consideration the University received from Dr. Couture in exchange for the lump sum payment was twofold: first, it received a full release of liability from any and all causes of action or claims that Dr. Couture could have brought against the University; second, NMSU argues that Dr. Couture's agreement to relinquish her property right to her tenured position was also sufficient consideration. According to Mr. Kite, the legal release signed by Dr. Couture had great financial value to the University as the University was released from all liability claims and property right claims that could have been brought by Dr. Couture.

For two reasons, we believe that the lump sum Dr. Couture received under the Settlement Agreement was supported by consideration. First, when she signed the Settlement Agreement, Dr. Couture gave up her right to initiate a lawsuit against the University and released the University from any and all causes of action. Dr. Couture's actions constituted forbearance, which is a type of consideration. Second, the Settlement Agreement required Dr. Couture to relinquish her rights to tenure. Tenured public employees have a property interest in continued employment, consequently, they cannot be discharged without due process. Salazar v. City of Albuquerque, 776 F. Supp. 2d 1217, 1236 (D.N.M. 2011). "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." Perry v. Sindermann, 408 U.S. 593, 601 (U.S. 1972). See also Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2709 (1972) ("college professors and staff members dismissed during the terms of their contracts ... have interests in continued employment that are safeguarded by due process").

The Contract provides that, in addition to her position as president of the University, Dr. Couture would be "granted the faculty rank of [p]rofessor with tenure in the appropriate department of the College of Arts and Sciences at the University." See Contract, Section 10.1. Dr. Couture's tenure was granted on or about November 20, 2009, when Dr. Couture received unanimous support from the English Department's Tenure and Promotion Committee for tenure in the English Department. Consequently, because her right to tenure vested prior to the time the Settlement Agreement was reached, Dr. Couture had a protected property interest in continued employment. Because Dr. Couture had a legitimate right or claim in continued employment, the terms of the terms

of the Settlement Agreement requiring her to forbear from exercising that claim constituted consideration for the lump sum payment.

Based on our review, because NMSU received consideration from Dr. Couture under the Settlement Agreement in the form of Dr. Couture's release of any and all claims she could have brought against the University, as well as a relinquishment of her property right to continued employment, we do not believe the lump sum payment constituted an unconstitutional gift to Dr. Couture.²

2. Whether NMSU's payment to former President Barbara Couture as part of a settlement agreement violated Article IV, Section 27 of the New Mexico Constitution.

Article IV, Section 27 of the New Mexico Constitution states:

No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

This constitutional provision prohibits increasing or decreasing any public officer, servant, agent, or contractor's compensation during his or her term of office. See State ex rel. Gilbert v. Board of Comm'rs of Sierra County, 29 N.M. 209, 213-214, 222 P. 654, 655 (1924) ("The constitutional provision in question is plain and emphatic; the words used are apt, direct, and construe themselves."). In State ex rel. Gilbert v. Board of Comm'rs of Sierra County, the New Mexico Supreme Court stated that this provision was designed to protect "the individual officer against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge" as well as to prevent against the "bestowal of an unmerited increase." Id. at 214, 222 P. at 655.

Pursuant to the Settlement Agreement that was executed on October 1, 2012, Dr. Couture was required to resign from the position of President "immediately" and was placed on administrative leave, during which she was to be "available" to perform such other matters as may be directed. Settlement Agreement, Section 1. While on leave, the Settlement Agreement provided that Dr. Couture would continue to receive her salary and benefits until December 31, 2012, her last day of employment. Id.

The lump sum payment of \$453,092.72, was a separate payment scheduled for no later than January 15, 2013. See id. Section 2. According to Mr. Kite, "[t]he payment made pursuant to the Settlement Agreement and Release was not the payment of salary or compensation, but constituted a payment representing legal consideration for the release of all claims."

As discussed above, the lump sum was paid by the University as consideration for Dr. Couture's promise to relinquish any and all potential claims she could have brought against the University as well as for her promise to relinquish her property right to

tenure. The lump sum did not constitute additional or extra compensation for Dr. Couture's services rendered under the Contract. Consequently, based on the above discussion, we do not believe that the Settlement Agreement violated Article IV, Section 27 of the New Mexico Constitution.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

JENNIFER
Assistant Attorney General

SALAZAR

[1] The Contract also provides that the tenure position was dependent upon "receiving a favorable recommendation from the appropriate department and the College of Arts and Sciences." See Contract, § 10.1. In a November 30, 2009 letter from Monica Torres, Department Head, to Greg Fant, Interim Dean, Ms. Torres indicated that the Tenure and Promotion Committee of the English Department unanimously approved Dr. Couture's tenure in the Department of English.

[2] Although not applicable here because there are no facts to suggest that Dr. Couture owed a monetary obligation to the University, Article IV, Section 32 of the New Mexico Constitution should be considered whenever a state entity wishes to release or extinguish a monetary obligation that is owed to it. Article IV, Section 32 states, in pertinent part: "No obligation or liability of any person ... held or owned by or owing to the state ... shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished..., nor shall any such obligation or liability be extinguished except by payment ... or by proper proceeding in court."