

June 4, 2004: Performance Bonuses, Retroactive Pay Increases and Bonuses in Lieu of Pay Increases

The Honorable Cisco McSorley

State Senator

1200 Pennsylvania N.E.

Albuquerque, NM 87110

Re: Opinion Request – Performance Bonuses, Retroactive Pay Increases and Bonuses in Lieu of Pay Increases

Dear Senator McSorley:

You requested our advice regarding performance bonuses, retroactive pay increases and bonuses in lieu of pay increases for University of New Mexico Hospital (“University Hospital”) employees. In particular, you ask:

1. Is it illegal for University Hospital to negotiate retroactive pay increases for employees represented by District 1199NM?
2. Is it illegal for University Hospital to grant performance bonuses to its employees for work already performed?
3. Is it illegal for University Hospital to grant bonuses in lieu of a pay increase for employees?

As discussed below, the payment of retroactive pay increases and bonuses for services already performed is prohibited by the New Mexico constitution. A bonus in lieu of a pay increase is permissible only if paid prospectively for future services.

The payment of retroactive pay increases and bonuses to public employees implicates two provisions of the New Mexico Constitution. The first, often referred to as the “extra compensation clause,” provides in pertinent part:

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

N.M. Const. art. IV, [§ 27](#). The second provision is generally known as the “antidonation clause” and provides that, with certain exceptions not relevant here:

Neither the state nor any county, school district or municipality ... shall directly or indirectly ... make any donation to or in aid of any person, association or public or private corporation....

N.M. Const. art. IX, § 14. A “donation” for purposes of the antidonation clause is "a ‘gift,’ an allocation or appropriation of something of value, without consideration." Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920 (1956).

A retroactive salary increase or performance bonus is, by its nature, additional pay for services already performed by an employee and, as such, a gift of public money. Consequently, this office consistently has concluded that the payment of retroactive salary increases and bonuses to public employees for services already performed is prohibited by the constitution. See, e.g., Att’y Gen. Op. No. 7107 (1971) (Art. IV, § 27 prohibited state agency from giving retroactive pay increases to its employees); No. 62-28 (1962) (retroactive salary increases for Miners’ Hospital employees prohibited); No. 57-17 (1957) (legislature had no power to give retroactive pay increases to state employees after their services have already been rendered); No. 4440 (1944) (bonuses for teachers prohibited by Art. IV, § 27 and Art. IX, § 14).

The constitution focuses on retroactive salary increases. See State ex rel. Sedillo v. Sargent, 24 N.M. 333, 336, 171 P. 790 (1918) (Art. IV, § 27 prevents the giving of extra compensation to a public contractor for services already performed under an existing contract). The constitution does not preclude a public employer, such as University Hospital, from considering its employees’ past performance when deciding how to compensate them, as long as the employees are paid in return for future services. Thus, University Hospital might, consistent with the constitution, pay its employees a bonus or one-time salary increase if the bonus or increase and the criteria for receiving it were included in the employees’ compensation plan or agreement before services were rendered.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you 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 public.

Sincerely,

Elizabeth A. Glenn

Assistant Attorney General