



State of West Virginia
Office of the Attorney General

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October 1, 2013

The Honorable Glen B. Gainer III
State Auditor
State Capitol Complex, Bldg. 1, Rm. W-100
Charleston, WV 25305

Dear Auditor Gainer,

You have asked for an Opinion of the Attorney General about whether state law allows a particular state governmental employer to pay an employee performance incentives and settlement remittances. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that “the attorney general shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the auditor[.]” To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Attorney General’s Office.

Your letters raise two legal questions, each addressed in turn below:

(1) May the state governmental employer include performance incentives in its employee’s contract? (2) May the employer make payments to its former employee under a litigation settlement entered into at a later time?

Background

Your request centers on the propriety of two contracts between a particular state governmental employer and one of its former employees. The first contract is an agreement in which the employer hired the employee. Under this employment agreement, the state entity agreed to pay the employee a base salary for a set number of years, plus additional performance-based incentives. These incentives provide that the employer would pay the employee additional sums either if the employee completed certain specified tasks or if persons within the employee’s

area of responsibility achieved certain metrics of success. The employment agreement stated that if the employer terminated the employee for cause, the employee would not be entitled to any compensation beyond what the employee had already earned. But if the employer terminated the employee without cause, the employee would be entitled to the base salary for the full remaining time under the contract. The employment agreement purports to be confidential.

The second contract arose after the employment agreement. In this contract, the employee agreed to resign his employment and to release all claims the employee might have against the employer. In exchange, the employer agreed to pay the employee the base salary under the remainder of the contract term plus an additional amount. This settlement agreement also purports to be confidential.

In two recent letters, you wrote to the Office of Attorney General, following up on a series of unanswered Opinion requests from the past decade. The first letter attached a number of earlier requests that had asked whether various state governmental entities—from municipalities to counties to state agencies—may offer performance-based payments to public employees. Your most recent letter to us further requested an Opinion on several specific issues involved in this employee's contracts and asked several specific legal questions, including whether you must honor the confidentiality clauses in the two agreements.

We answer your legal questions below with the exception of your concerns regarding confidentiality. Although the general rule is that litigation settlement agreements involving a public body must be disclosed under the West Virginia Freedom of Information Act, *see* Syl. pt. 2, *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1996), we lack sufficient facts to apply that rule to the specific contracts at issue. Without more information, we cannot determine whether an exception to the Act applies or other reasons exist that may bear on the issues of confidentiality. Accordingly, we have chosen in this letter not to disclose any specifics of the contracts or other information, including certain legal citations, that might identify the particular employer or employee.

Question One: May the state governmental employer include performance incentives in its employee's contract?

In your requests for an Opinion, you asked whether any state law prohibits performance incentives of the type in the employee's employment agreement. You focused specifically on Article VI, Section 38 of the West Virginia Constitution ("Section 38") and West Virginia Code § 12-3-13. Under Section 38, "[n]o extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, *after* the services shall have been rendered or the contract made ... [n]or shall the salary of any public officer be increased or diminished during his term of office." W. Va. Const. art. VI, § 38 (emphasis added). Separately, West Virginia Code § 12-3-

13 provides that compensation may not be paid *before* services are rendered: "No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." W. Va. Code § 12-3-13.

Article VI, Section 38 of the West Virginia Constitution

For two independent reasons, the constitutional restriction does not bar the employment agreement in question. *First*, Section 38 is inapplicable here because the employee's contract contained a previously-bargained-for performance incentive, not a pure gratuity. A gratuity is an after-the-fact tip for good service. Gratuities often take the form of non-contract lump-sum payments to employees *after* the employees already rendered their services for predetermined salaries. 61 W. Va. Op. Att'y Gen. 29 (1985). Such payments run afoul of Section 38 because they increase an employee's compensation for a set amount of work after the terms of employment have been agreed upon and the work has been done.

Section 38 does not prohibit bargained-for increases in compensation that occur prior to the start of the work. For example, the legislature may increase compensation for judges, but may only do so at the start of new terms of office. *Harbert v. Harrison Cnty. Court*, 129 W. Va. 54, 71, 39 S.E.2d 177, 189 (1946). Similarly, this Office has determined that annual salary adjustments based on years of service do not constitute impermissible bonuses for purposes of Section 38. *See* 63 W. Va. Op. Att'y Gen. 37 (1990).

Nor does Section 38 forbid the State from granting contemporaneous salary increases to employees who are newly expected to perform additional services. *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 547, 177 S.E.2d 214, 217 (1970); 55 W. Va. Op. Att'y Gen. 168 (1973) (same); 61 W. Va. Op. Att'y Gen. 13 (1985) (same); 56 W. Va. Op. Att'y Gen. 198 (1975) (same). Extra compensation may generally be given whenever a position is modified such that new duties make the job "embrace a new field . . . beyond the scope or the range of the office as it formerly existed or functioned." *Springer v. Board of Education*, 117 W. Va. 413, 413, 185 S.E. 692, 694 (1936); *State ex rel. Goodwin v. Rogers*, 158 W. Va. 1041, 1055, 217 S.E.2d 65, 73 (1975) (same). The duties must not be purely incidental, however. Thus, the West Virginia Supreme Court of Appeals has held that Section 38 barred the State from granting a pay raise when the employee's duties were expanded only by an incidental requirement to attend a new in-service training program. *Delardas v. Cnty. Court of Monongalia Cnty.*, 155 W. Va. 776, 789, 186 S.E.2d 847, 856 (1972).

In light of these principles, this Office has previously opined that it is consistent with Section 38 for the State to include prospective performance incentives in employment contracts. Specifically, this Office previously determined that teachers cannot be paid a cash bonus for unused leave, where such a bonus was not a pre-negotiated part of the teachers' contracts prior to

the start of employment for the school year. 59 W. Va. Op. Att’y Gen. 86 (1981). The Opinion found the pay-out objectionable because it “would be paid after the employee had performed the very services he had contracted to perform, and it would be paid solely for ‘coming to work.’” *Id.* However, Section 38 would not preclude a contract that included an option for additional compensation if the employee met certain conditions, such as not taking any leave. *Id.* This Office suggested that “the potential constitutional objections may be curable at least as to prospective school years by inserting appropriate language into the standard employment contracts so that the incentive plan becomes, in effect, part of the contract before the services are rendered.” *Id.*

That earlier Opinion comports with the plain text of Section 38. Significantly, Section 38 provides that “[n]o extra compensation shall be granted or allowed ... after the services shall been rendered *or the contract made.*” W. Va. Const. art. VI, § 38 (emphasis added). The highlighted phrase supports the notion that the provision is directed at *non-contract* payments and does not prohibit performance incentives included in a contract.

The Opinion is also consistent with the decision of the highest court in at least one other state that has a similar constitutional provision. Article III, § 19 of the Nebraska Constitution—like Section 38—provides that “[t]he Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered.” The Supreme Court of Nebraska has interpreted this provision to allow bargained-for payments, even if contingent on unknown events. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 83, 752 N.W.2d 137, 147 (2008). “[W]hen the ‘services’ for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity.” *Id.* The Court accordingly held that an agreement to pay severance, in the event of termination, did not constitute an impermissible gratuity because it induced employees to perform future services. *Id.* at 84, 752 N.W.2d at 148; *see also* Fla. Op. Att’y Gen. 2007-26 (stating with regard to a Florida law similar to Section 38 that “[e]xtra compensation generally refers to an additional payment for services performed or compensation over and above that *fixed by contract* or law *when the services are rendered*” (emphasis added)).

In accord with this Office’s previous Opinion, we conclude that the performance incentives at issue here are allowable under Section 38. The employment agreement between the state employer and the employee established at the outset of a term of employment that the employee would be paid additional amounts based on future performance that went above and beyond the employee’s regular duties. Those payments constitute previously-bargained-for performance incentives, not after-the-fact gratuities, and therefore are not objectionable for purposes of Section 38.

Second, Section 38 also does not apply to the employee's contract because the compensation was not set by statute or fixed by some other law. Our Supreme Court of Appeals has held that the constitutional ban on extra compensation "applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the Constitution of the State or by statute made in pursuance thereof." *Rucker v. Bd. of Supervisors of Pocahontas Cnty.*, 7 W. Va. 661, 663 (1874) (interpreting a predecessor provision with the same language); *id.* at 661 n.1 (setting forth language of provision). Where a governmental entity is allowed by statute some measure of discretion to set the employee's compensation, the constitutional ban does not apply. *Id.* at 663-64 (holding that the restriction does not apply to a prosecutor's salary where a state statute gives a county board discretion over the range of fees going toward the prosecutor's compensation). While state courts have not revisited *Rucker* in recent times, or specifically applied its holding in modern state employment contexts, the case remains good law today.

In this case, the employee's salary was not set by Constitution or statute and, therefore, Section 38 does not apply. Like many other state entities, the state employer in question is exempt from the Division of Personnel's rules, has the statutory authority to promulgate its own personnel rules, and is empowered to enter into personal contracts. Under the employer's own rules, it had complete discretion to set the compensation of the particular employee at issue by contract, as the employee was not subject to any sort of salary schedule. That discretion and the authority to enter into contracts put the contracted-for performance-based incentives at issue here beyond the reach of Section 38.

West Virginia Code § 12-3-13

We also conclude that West Virginia Code § 12-3-13 does not forbid the employment agreement at issue. That provision mandates that "[n]o money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." W. Va. Code § 12-3-13. This means that a contract must make all payment contingent on actual performance of some stated services. A signing bonus, or other amount to be paid before an employee began and performed some work, would be unlawful. The arrangement here is consistent with the statutory restriction because the employer agreed to pay an incentive after the employee undertook a specific act or achieved a certain goal.

Question Two: May the employer make payments to its former employee under a litigation settlement entered into at a later time?

You also requested that this Office opine on the legality of a second contract that arose after the employment agreement. Based on the materials you have provided, this second contract resembles a litigation settlement. Under this agreement, the employer and the employee have

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agreed to release their legal claims against one another in exchange for consideration. The employer has agreed to pay the employee a certain sum, and the employee has agreed to resign and forgo any claims the employee might have had against the institution. The payments that the institution must make under the settlement agreement appear to match the employee's salary under the employment agreement, but there is no pay-out of any unearned performance incentives.

Based on what you have told us, the settlement agreement does not appear to contravene West Virginia law. The employer is expressly provided by statute the power to conduct its financial and business affairs, which would seem to include the authority to settle active and potential legal claims against it. Assuming that the settlement agreement is not invalid for other reasons, the agreement binds the employer to make payments in the future years as scheduled under the contract. Without additional facts, we do not address broader issues about the employer's power to obligate the State to make payments under future appropriations, but should you have further questions, please do not hesitate to contact this Office.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Morrisey", with a long horizontal flourish extending to the right.

Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General

Christopher S. Dodrill
Assistant Attorney General