



State of West Virginia
Office of the Attorney General

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August 17, 2015

Dr. Keith J. Cotroneo, President
Mountwest Community and Technical College
One Mountwest Way, Suite 417
Huntington, WV 25701

Dear Dr. Cotroneo:

You have asked for an Opinion of the Attorney General about the state constitution's prohibitions on increasing a public officer's salary and giving state employees extra compensation. This Opinion is being issued under 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 head of any state educational . . . institution." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

By statute, Mountwest Community and Technical College's board of governors has general authority to make "changes in salary or compensation" for college employees. W. Va. Code § 18B-2A-4(w). No statutory pay schedule limits the board's discretion, and all college employees are exempt from the Division of Personnel's rules. This salary-setting power follows the board's larger power to "[d]etermine, control, supervise and manage the financial, business and education policies and affairs of the" college. *Id.* § 18B-2A-4(a).

Under this authority, the board decides whether to give college employees raises. According to your correspondence, the board sets a pay schedule for classified staff, because no statutory pay schedule currently applies, W. Va. Code § 18B-9-3,¹ and the board approves annual raises for non-classified staff. And, you say, the board's usual practice is to issue the president a yearly contract and to issue faculty letters of term appointment with any annual raises (the

¹ A few years ago, this pay schedule governed classified staff at the college. *See* W. Va. Code § 18B-9-3 ("Temporary Higher Education Classified Employee Annual Salary Schedule"). But when the college met the requirements in state code to fund the schedule, the college was relieved of the duty to abide by the schedule. *See* Letter from Jim Skidmore, Chancellor for the Community & Technical College System, to Dr. Cotroneo, President, Mountwest Community and Technical College, June 15, 2012.

Council for Community and Technical Colleges' concurrence necessary for presidential raises), and the board has a standing order authorizing faculty raises during the year upon promotion to a higher rank. In short, you represent that the college has contract and non-contract employees, whose salaries and compensation are determined entirely by the discretion of the board within the board's discretion.

According to your letter, the board recently authorized a one-time salary enhancement of \$500 for all college employees, but the State Auditor refused to allow the payments. Last fall, the board approved the following resolution:

Be it resolved that the Mountwest Community & Technical College Institutional Board of Governors approves of a one-time \$500.00 non-base building salary enhancement for all full-time employees of the college on the payroll December 1, 2014, and that the enhancement be paid December 16, 2014.

The Auditor refused payment because of the state constitution's prohibition on after-the-fact bonuses, set forth in Article 6, Section 38 of the state constitution. You now ask whether that constitutional provision prevents the board's salary enhancements.

Section 38 of Article 6 of the state constitution includes two separate prohibitions relating to the pay of public employees. In pertinent part, the provision states:

[1] No 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 [2] Nor shall the salary of any public officer be increased or diminished during his term of office

W. Va. Const. art. VI, § 38. These prohibitions are echoed elsewhere in West Virginia law,² and many states have similar provisions.³

² See also W. Va. Const. art. VII, § 19 ("The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms, and they shall not, after the expirations of the terms of those in office at the adoption of this amendment, receive to their own use any fees, costs, perquisites of office or other compensation."); W. Va. Code § 6-7-7 ("No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered, nor shall the salary of any public officer be increased or diminished during his term of office.").

³ E.g., Ala. Const. art. IV, §§ 68, 68.01; Ariz. Const. art. IV, Pt. 2 § 17; Ark. Const. art. V, § 27; Cal. Const. art. IV, § 17; *id.* Art. XI, § 10; Colo. Const. art. V, § 28, art. VI, § 18; Conn. Const. art. XI, § 2; Ga. Const. art. III, § 6, ¶ VI; Iowa Const. art. III, § 31; Md. Const. art. III, § 35; Mich. Const. § art. XI, § 3; Miss. Const. art. IV, § 96; Mo. Const. art. III, § 39; *id.* Art. VII, § 13; Neb. Const. art. III, § 19; N.M. Const. art. IV, § 27; Ohio Const. art. II, §§ 20, 29; Pa. Const. art. III, § 26; S.C. Const. art. III, § 30; S.D. Const. art. XII, § 3; Tex. Const. art. III, §§ 44, 53; Va. Const. art. IV, § 14; Wash. Const. art. II, § 25; Wis. Const. art. IV, § 26; Wyo. Const. art. III, § 30; see also D.C. Code, 2001 Ed. Act of 1871 Creating Legislative Assembly § 15; Puerto Rico

Your letter thus raises two questions under Section 38, Article 6 of the West Virginia Constitution, which we address in turn below:

Does a temporary salary enhancement for state college employees unconstitutionally (1) increase a public officer's salary or (2) provide extra compensation to a state officer, agent, servant, or contractor?

Question One: Does a temporary salary enhancement for state college employees unconstitutionally increase a public officer's salary?

Broadly speaking, Section 38 does not permit the salary of a public officer to be changed once the officer has started his or her term. The plain text states: “[T]he salary of any public officer [shall not] be increased or diminished during his term of office.” W. Va. Const. art. VI, § 38. This clause “assures the people that those who serve them as public officers shall give their services during their terms for the amount of compensation for which they were willing to serve and have been selected, and for which they were expected by the people to serve at the time of their entrance upon the performance of their duties.” *Harbert v. Harrison Cnty. Court*, 129 W. Va. 54, 62, 39 S.E.2d 177, 185 (1946). The prohibition applies “to all the agencies of government,” and prevents “attacks upon officials by those who may be possessed, at any time, of the means and the will to influence or control their course of conduct through added income at public expense.” *Id.* at 61-63, 39 S.E.2d at 184-85. Where this clause applies, a change to salary must take effect before the officer starts his or her term. *See* 35 W. Va. Op. Att’y Gen. 152, 1933 WL 29791 at *3 (April 3, 1933) (opining that the cut-off point for salary changes is the formal start of the officer’s term).

The West Virginia Supreme Court of Appeals, however, has placed important limitations on the scope of the prohibition. The clause does not prohibit an in-term raise that is attendant upon “new and additional” job responsibilities. *See Delardas v. Cnty. Court of Monongalia Cnty.*, 155 W. Va. 776, 781–82, 186 S.E.2d 847, 851 (1972) (clause “does not inhibit an increase in the amount of the salary of a public officer during the term of his office if . . . the officer [receives] new and additional duties which are not mere incidents of his office but which embrace a new field, beyond the scope and range of the office.”); *Delardas v. Cnty. Court of Monongalia Cnty.*, 158 W. Va. 1027, 1032, 217 S.E.2d 75, 78 (1975) (“[S]alary increases to incumbent public officials are permissible only when such additional compensation is based upon the imposition of new and additional duties beyond the scope and range of public officials’ offices as they had theretofore existed and functioned.”). Nor does the clause apply to public employees who are not “public officers,” *see State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276, 278–80, 284 (1923) (differentiating public officers, whose salaries fall under this clause, from mere “servants” and “employees,” whose salaries do not), or those who do not serve fixed terms, *see* 47 W. Va. Op. Att’y Gen. 147, 1957 WL 55197 at *13 (Feb. 6, 1957) (clause “does not embrace those officials who serve at the will and pleasure of the appointing authority” unlike

Const. art. VI, § 10; *cf.* Ill. Const. art. VII, § 9; Ky. Const. §§ 161, 235; La. Const. art. VII, § 14; Minn. Const. art. VI, § 5; Mont. Const. art. V, § 5, art. VI, § 5; N.Y. Const. art. III, §§ 6, 17, art. XIII, § 7; Okla. Const. art. XXIII, § 10; Tenn. Const. art. VI, § 7; Fla. Stat. § 215.425; Idaho Code § 59-512.

“those who serve for fixed terms.”); 37 W. Va. Op. Att’y Gen. 50, 1937 WL 34734 at *1 (Jan. 14, 1937) (“Where there is no fixed term the restriction has no application.”).

Relevant here, the provision also does not apply if the salary in question is not “definitely fixed or prescribed by law.” Syl. Pt. 1, *Rucker v. Bd. of Supervisors of Pocahontas Cnty.*, 7 W. Va. 661, 663 (1874) (clause “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”). In a longstanding precedent that appears to still be good law, the West Virginia Supreme Court of Appeals held that the clause did not apply to a Prosecuting Attorney because no law specifically required a fixed salary. Rather, the law merely granted the Prosecuting Attorney the ability to earn certain fees, as well as an allowance from the county government. *Rucker*, 7 W. Va. at 663–64. Based on that decision, this Office has opined that the provision did not apply where a public employer was not required to fix a salary, but instead had “complete discretion to set the compensation of [a] particular employee by contract.” W. Va. Op. Att’y Gen., 2013 WL 5508581 at *4 (Oct. 1, 2013).

In contrast, the West Virginia Supreme Court of Appeals has applied the provision where the law specifically provides for a fixed salary for a public officer, even if the law grants some measure of discretion to the employer in determining the precise amount. For example, where a statute expressly mandated that a “county health officer shall receive an official salary of” an amount to be fixed by the county, the county was not permitted to raise or lower “the annual salary” that the county “fixed at the time of his appointment.” *Schwartz v. Cnty. Court of Hancock Cnty.*, 136 W. Va. 626, 634, 644–45, 68 S.E.2d 64, 68–69, 74 (1951) (quotations omitted). Likewise, where the Legislature had expressly capped the fixed salary of school superintendents, a superintendent was not allowed to receive “the benefit or detriment of [a later] statutory provision” that changed that cap. *Jackson v. Bd. of Ed. of Kanawha Cnty.*, 128 W. Va. 154, 156, 159, 35 S.E.2d 852, 853–54 (1945).

Here, Section 38’s prohibition on raising “the salary of any public officer . . . during his term” does not apply to the board’s salary enhancements because no law dictates that any of the college’s employees have a fixed salary. Syl. Pt. 1, *Rucker*, 7 W. Va. at 663. The board has complete discretion to make “changes in salary or compensation” for its college employees. W. Va. Code §§ 18B-2A-4(w), 18B-2A-4(a). No law, statutory pay schedule, or Division of Personnel rule requires a fixed salary or limits the board’s discretion.

Question Two: Does a temporary salary enhancement for college employees unconstitutionally provide extra compensation to any state officer, agent, or contractor in violation of Section 38?

The second prohibition under Section 38 concerns after-arising compensation and is, in many respects, broader than the first prohibition. While the above-described salary clause only precludes *public officers* from having their salaries changed, this second prohibition states that “[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.” W. Va. Const. art. VI, § 38. And while the salary clause has been held to apply only to a salary “definitely fixed or prescribed by law,” Syl. Pt. 1, *Rucker v. Bd. of Sup’rs of Pocahontas Cnty.*, 7 W. Va. 661, 661 (1874), the state supreme court has never so limited the extra compensation clause. Indeed, at

least two other state high courts have held that similar clauses in their state constitutions are so “comprehensive” that they “void” any extra compensation “whether [or not] the rate of compensation has been prescribed by law.” *People v. Spruance*, 6 P. 831, 835 (Colo. 1885); *State ex rel. Field v. Williams*, 34 Ohio St. 218, 219–20 (1877). As the Supreme Court of Ohio has said, “[t]his language is very broad,” and covers those whose “compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract.” *Field*, 34 Ohio St. at 219–20.

We examine below the various aspects of the clause and conclude that it partially prohibits the contemplated salary enhancement. We look first at the scope of “extra compensation,” and then consider what is meant by “after the services shall have been rendered or the contract made.” Applying those analyses, we believe that the salary enhancement would be appropriate for non-contract employees but prohibited for employees under contractual terms.

A. 1. Generally speaking, the prohibition on “extra compensation” means that no public official, agent, employee, or contractor may receive more than their “agreed-upon compensation.” 61 W. Va. Op. Att’y Gen. 29, 1985 WL 257934 at *3 (June 28, 1985). Once the state enters a contract to employ a person or an at-will employee starts work, the state has purchased the person’s set services at an agreed-upon price, after which the state may not pay more for the services contracted for or rendered. The state cannot pay an employee extra after the employee “performed the very services he had contracted to perform,” as that would amount to paying the employee a bonus simply for having come “to work.” 59 W. Va. Op. Att’y Gen. 86, 1981 WL 157182 at *1 (Feb. 3, 1981). Granting extra money after that point would be “a gratuity” and just “give away public funds.” 51 W. Va. Op. Att’y Gen. 313, 1965 WL 92445 at *4 (May 25, 1965).

Nearly any such extra payment is unlawful—no matter how salutary a public purpose the payment may serve. Previous opinions from this Office have found unlawful extra payments to “supplement salary deducted from other nongovernmental wages because of time spent on official duties,” 61 W. Va. Op. Att’y Gen. 17, 1985 WL 257922 at *1 (April 19, 1985), and the retroactive award of annual or sick leave to employees who had not been entitled to accrue leave, 67 W. Va. Op. Att’y Gen. No. 3, 1998 WL 2028951 at *4 (Mar. 5, 1998).⁴ Other state attorneys general have found that similar provisions prohibit bonuses at Christmas as well as severance payments not previously agreed to. *E.g.*, Op. S.C. Att’y Gen., 2012 WL 6218333 at *1 (Dec. 4, 2012) (opining that a parallel state constitutional provision prohibits “a Christmas bonus program

⁴ One narrow exception is retirement benefits, which the Supreme Court of Appeals has held for public policy reasons do not constitute “compensation” for purposes of Section 38. *E.g.*, Syl. Pt. 5, *Campbell v. Kelly*, 157 W. Va. 453, 454, 202 S.E.2d 369, 371 (1974) (“Legislative pensions do not constitute ‘extra compensation’ nor ‘salary’ within the meaning of Article VI, Section 38 of the Constitution of the State of West Virginia.”); 2014 WL 4071501, at *4 (W. Va. A.G. Aug. 11, 2014) (opining that changes to retiree health benefits are not extra compensation or a salary change under either clause of Section 38).

for reserve police officers”); Fla. Att’y Gen. Op. 2007-26, 2007 WL 1890763 at *1–2 (June 26, 2007) (opining that a parallel state statute forbids “severance payments in lieu of notice”).⁵

2. Of course, an employer does not grant “extra” compensation when it pays an employee the originally agreed-upon compensation. As one court has explained in discussing an equivalent provision, “[t]here is no reason why a [public employer] may not engage its servants and employees upon any terms of payment acceptable to both parties” at the outset of employment. *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. Comm’n App. 1928). Thus, this Office recently opined that state employers may incentivize good work by committing in advance that an employee will be paid more if he or she achieves certain outcomes. W. Va. Op. Att’y Gen, 2013 WL 5508581 at *4 (Oct. 1, 2013). Similarly, other state courts and attorneys general have concluded that severance payments are permissible if they are bargained for in advance. See *City of Omaha v. City of Elkhorn*, 752 N.W.2d 137, 147–49 (Neb. 2008); Ark. Op. Att’y Gen. No. 2008-186, 2007 WL 1890763 at *5–6 (Feb. 12, 2009). Deferred “compensation which accrued in strict pursuance to a contract made before the work was done” is not “extra” compensation. *Christie v. Port of Olympia*, 179 P.2d 294, 299 (Wash. 1947) (en banc); see also *State v. Davis*, 539 So. 2d 803, 811 (La. Ct. App. 1989) (ban on “extra compensation for past services rendered” may not apply if payments in question proven to be “salaries for services rendered but for which no salary was drawn when the services were rendered”); *Mississippi Employment Sec. Comm’n v. Culbertson*, 832 So. 2d 519, 529–30 (Miss. 2002) (back pay, previously due, but unpaid because of administrative error, is not “extra” compensation).

Nor does it constitute “extra” compensation if a public employer grants extra pay for additional consideration. A public employer can pay an employee extra for additional duties not germane to his or her original work. *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 547, 177 S.E.2d 214, 217 (1970); see also *Syl. State ex rel. Bd. of Governors of W. Va. Univ. v. Sims*, 136 W. Va. 789, 796, 68 S.E.2d 489, 492–93 (1952) (retired employees may be paid above their retirement allowance for new services); *Townsend v. Hoover City Bd. of Educ.*, 610 So. 2d 393, 396–97 (Ala. Civ. App. 1992) (new employment contract with a raise is permissible, so long as the raise and contract is for “a different term of employment than the prior contracts” and contract does “not attempt to provide [the employee] with additional compensation for the period during which he had already served”). So, too, are payments to an employee under a litigation settlement permissible as new amounts agreed upon for releasing legal claims. W. Va. Op. Att’y Gen, 2013 WL 5508581 at *5 (Oct. 1, 2013). A release provides “adequate consideration to support a binding contract” and a payment in return is thus “not an unconstitutional gratuity.” *Myers v. Nebraska Equal Opportunity Comm’n*, 255 Neb. 156, 163, 582 N.W.2d 362, 367 (1998).

⁵ A small minority of states have taken a more liberal view of their extra compensation clauses. E.g., *Jarvis v. Cory*, 620 P.2d 598, 599, 601–07 (Cal. 1980) (holding that the state could “award a lump sum payment to certain state employees based on work already performed” if at the time services were rendered the employees “justifiably” thought their salaries could be subject to retroactive increase); 2006 Ariz. Op. Att’y Gen. No. I06-003, 2006 WL 2702207 at *4–5 (Sept. 6, 2006) (opining that a school may give teachers extra pay above a contractual amount due to an asserted public interest in retaining and recruiting public school employees).

B. Critically, extra compensation is only prohibited under the clause at two very specific points in time. It is forbidden “[1] after the services shall have been rendered or [2] the contract made.” Following the plain text and longstanding principles of statutory interpretation, we believe these two distinct limitations have significant practical import.

1. Turning first to the prohibition on extra compensation “after . . . the contract [is] made,” we read that language plainly to limit contractual employees to the terms of their written deals with the state. As this Office has previously opined, a public employer thus may not pay more than agreed for “services [an employee] had contracted to perform,” as that would amount decito simply paying the contracted employee for “coming to work.” 59 W. Va. Op. Att’y Gen. 86, 1981 WL 157182 at *1 (Feb. 3, 1981). Consistent with that conclusion, other state high courts have prohibited legislatures from “allocat[ing] extra compensation to public employees already covered by a contract of employment” for work due to the state under the contract, *Denbow v. Borough of Leetsdale*, 729 A.2d 1113, 1118 (Pa. 1999), and county officials from paying a construction contractor money “in excess of that for which he contracted” when the state would be receiving nothing more than the building project already owed under the contract, *Clark v. Miller*, 105 So. 502, 505 (Miss. 1925).

We do not believe, however, that the restriction on extra compensation “after . . . the contract [is] made” has any applicability to non-contractual employees, *e.g.*, at-will employees. This is clear for several reasons. *First*, non-contractual employees by definition have no contract, so there would be no logical way to apply the restriction. *Second*, the language of Section 38 plainly contemplates a distinction between contract employees and others. “[C]ontractors” are explicitly identified under Section 38—separate and apart from “public officer[s], agent[s], [and] servant[s].”

2. Instead, we conclude that the alternative restriction on extra compensation “after the services shall have been rendered” applies to non-contractual employees. As this Office has said, “[r]etropective pay increases” are “illegal” under this clause. 67 W. Va. Op. Att’y Gen. No. 3, 1998 WL 2028951 at *4 (Mar. 5, 1998). Construing similar prohibitions, other state courts have likewise held that a legislature may not provide their employees “a stated extra amount of compensation” for past services rendered, *Wimberly v. White*, 157 So. 472, 473 (Miss. 1934), or “giv[e] extra pay after the services were rendered” by enacting a pay raise statute that “purposes to antedate itself,” *Lavelle v. City of Scranton*, 1880 WL 14128 *2 (Pa. 1880). *See also Simpson v. Cranston*, 362 P.2d 492, 496 (Cal. 1961) (in bank) (prohibiting “retroactive” right to overtime for past services completed). Of course, as noted earlier, it does not constitute “extra” compensation if a public employer gives supplemental pay to a non-contractual employee for having completed additional duties beyond what was originally contemplated.

Importantly, this service-based restriction does not prohibit a public employer from authorizing at any time extra compensation to at-will employees that is contingent upon the performance of future services, *i.e.*, a pay raise. The text forbids extra compensation “*after* the services shall have been rendered”; it does not prohibit an increase in compensation *before* “the services are rendered.” So we have said that extra compensation under this clause must be “prospective only.” 67 W. Va. Op. Att’y Gen. No. 3, 1998 WL 2028951 at *4 (Mar. 5, 1998). Put another way, “when 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”

forbidden under this clause. See Syl. pt. 15, *City of Elkhorn*, 752 N.W.2d 137. That is why this Office has opined that the Legislature can authorize a statutory “incremental increase” in public salaries for future years: a future salary increase is “an annual salary adjustment and not a bonus.” 63 W. Va. Op. Att’y Gen. No. 37, 1990 WL 596840 at *2 (June 27, 1990). Again, courts in other states with similar provisions agree. See *Hartsfield v. Lafayette Cnty.*, 189 So. 177, 180 (Miss. 1939) (in banc) (striking down statute increasing compensation to the extent it applied to “service already rendered prior to the passage of the act,” but not “in its perspective views”); *Edwards v. McLean*, 23 Pa. Super. 43, 45 (1903) (holding that legislature may not add to “the payment of constables for services rendered” in the past, but could increase “fees to be paid in the future”); *Kohen v. Bd. of Sch. Comm’rs of Mobile Cnty.*, 510 So. 2d 216, 218, 220 (Ala. 1987) (school district may not pay extra for things done in the past, but may pay incentives that are “computed prospectively”).

What is more, we see no distinction between one-time, lump-sum prospective salary enhancements for at-will employees and permanent increases in base salary. The text says nothing about extra pay for future services, let alone regulates their “method or time of payment.” *City of Orange v. Chance*, 325 S.W.2d 838, 840 (Tex. Civ. App. 1959) (holding that this clause permits the prospective application of a policy of allowing lump-sum payouts of accrued sick leave). Nor is there a logically sound distinction to be found. As a practical matter, a one-time salary enhancement could simply be re-characterized as a prospective increase in base pay followed immediately by an equivalent reduction in base pay. And there is nothing in the clause forbidding a prospective reduction in compensation.

3. Under this analysis, the constitutional ban on extra compensation falls unevenly on contractual and non-contractual employees. Contractual employees may not receive any pay raise, prospective or retrospective, during an existing contract term. They can only be paid more if they have completed, or will complete, additional job duties, which constitute new consideration outside the existing contractual arrangement. In contrast, because non-contractual employees do not have a contract term, the restrictions on their pay are backward-looking only. They may not receive a pay raise for completed work, unless that work involved duties beyond those originally contemplated. But they may at any time receive a prospective raise of any amount or duration for future work.

While we believe that this result follows from the plain text of Section 38 and the overwhelming weight of authority from other states, we recognize the possibility for abuse on a case-by-case basis. A public employer might provide a facially prospective salary enhancement to an at-will employee but have the subjective intent that the payment be an extra reward for past conduct. Such a situation would appear to comply with the letter of the prohibition but violate its spirit.

We do not attempt to resolve that potential problem, however, as it seems to be a question better left for the courts to address in a proper case or series of cases. We would not presume to tell the courts that every challenge to a prospective salary enhancement requires an inquiry into the subjective motivations of the public employer, or conversely that such an inquiry should never be permissible. That is a potentially fact-dependent rule better suited for the courts to develop in the context of specific cases, if at all, than for this Office to create *ex ante* in the context of a non-adversarial request for a legal opinion.

Dr. Keith J. Cotroneo

August 17, 2015

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C. Our answer to question two thus is that under the facts presented in your correspondence, the board appears to have partially run afoul of the extra compensation clause of Section 38. Taking into account Section 38 only, the board appears to have lawfully authorized a one-time prospective salary enhancement of \$500 for non-contractual employees, but to have unlawfully authorized the same enhancement for employees serving a contract term. Again, we do not answer whether the board's subjective motivations for the salary enhancement are relevant to Section 38, nor do we possess the facts that would permit a proper assessment of those motivations.

Sincerely,

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Julie Marie Blake
Assistant Attorney General

C. Our answer to question two thus is that under the facts presented in your correspondence, the board appears to have partially run afoul of the extra compensation clause of Section 38. Taking into account Section 38 only, the board appears to have lawfully authorized a one-time prospective salary enhancement of \$500 for non-contractual employees, but to have unlawfully authorized the same enhancement for employees serving a contract term. Again, we do not answer whether the board's subjective motivations for the salary enhancement are relevant to Section 38, nor do we possess the facts that would permit a proper assessment of those motivations.

Sincerely,

A handwritten signature in black ink that reads "PATRICK MORRISSEY". The signature is written in a cursive, somewhat stylized font.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Julie Marie Blake
Assistant Attorney General