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Colonel J. R. Buckalew, Superintendent
Department of Public Safety
725 Jefferson Road
South Charleston, West Virginia 25309

Dear Colonel Buckalew:

You have requested the formal opinion of this office as to whether the decision of the Supreme Court of Appeals of West Virginia in Courtney v. State Dep't of Health, ____ W. Va. ____, 388 S.E.2d 491 (1989) requires your agency to pay a pro rata portion of a W. Va. Code § 5-5-2 incremental salary increase to an individual whose State employment terminates prior to July 1 of a given year.

Your inquiry must be answered affirmatively.

On March 10, 1984, the West Virginia Legislature passed Senate Bill No. 624, which amended and reenacted W. Va. Code §§ 5-5-1 and -2 (1990).

The statutes as they were subsequently amended on March 8, 1986, to become effective on July 1, 1986, read as follows:

§ 5-5-1. Definitions.

> For the purposes of this article: (1) "Eligible employee" means any regular full-time employee of the state or any spending unit thereof who is eligible for membership in any state retirement system of the state of West Virginia or other retirement plan authorized by the state: Provided, That the mandatory salary increase required by this article shall not apply to any faculty employee at public institutions of higher learning or any employee of the state whose compensation is fixed by statute or by statutory schedule, (except that the clerks, deputy clerks and magistrate assistants of magistrate courts shall be eligible for the incremental salary increases provided in this article and with such

increases to be allowable in addition to the maximum salaries and compensation for such employee offices under the magistrate court system statutes of article one [§ 50-1-1 et seq.], chapter fifty of the code), nor shall this article be construed to mandate an increase in the salary of any elected or appointed officer of the states; (2) "years of service" means full years of totaled service as an employee of the state of West Virginia; (3) "spending unit" means any state office, department, agency, board, commission, institution, bureau or other designated body authorized to hire employees.

§ 5-5-2. Granting incremental salary increases based on years of service.

Effective for the fiscal year beginning the first day of July, one thousand nine hundred eighty-five, every eligible employee with three or more years of service shall receive an annual salary increase equal to thirty-six dollars times the employees' years of service, not to exceed twenty years of service. In each fiscal year thereafter and on the first day thereof, each such employee shall receive an annual increment increase of thirty-six dollars for such fiscal year: Provided, That every employee becoming newly eligible as a result of meeting the three years of service minimum requirement on the first day of July in any fiscal year subsequent to one thousand nine hundred eighty-five, shall be entitled to the annual salary increase equal to the aforesaid thirty-six dollars times the employee's years of service, where he has not theretofore received the benefit of any such increment computation; and shall receive a single annual increment increase thereafter of thirty-six dollars for each such subsequent fiscal year. These incremental increases shall be in addition to any across-the-board, cost-of-living or percentage salary increases which may be granted in any fiscal year by the Legislature. This article shall not be construed to prohibit other pay increases based on merit, seniority, promotion or other reason, if funds are available for such other pay increases: Provided, however, That the executive head of each spending unit shall first grant the herein mandated increase in compensation to all eligible employees prior to the consideration of any increases based on merit, seniority, promotion or other reason.

While researching your question, it became apparent that this unusual method of salary adjustment selected by the Legislature has created some confusion which continues to persist today. In its enthusiastic efforts to definitively reward employees for their longevity in state employment, the Legislature unintentionally created a certain amount of confusion among administrators. Some agencies appear to interpret the salary adjustment to be a bonus. Still other agencies correctly consider it to be an annual payment of income earned during the previous fiscal year. In this last group, some agencies properly allow the salary adjustment to accrue during the year, and pay any accrued portion upon termination of employment during the fiscal year, while others incorrectly pay it only to those employed on July 1 of each year--a very literal approach to the application of the statutes. This latter approach attaches an unwarranted and overly restrictive significance to the recitation in the statute of the July 1 date.

It is clear that this incremental increase is an annual salary adjustment and not a bonus. The Constitution of West Virginia, Article VI, Section 38, provides, in relevant part, that: "No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services have been rendered or the contract made . . . ." (emphasis added). Much has been judicially penned regarding the importance of establishing definitively the salaries of public employees. It is deemed that as a general proposition better service will be rendered if the matter of salary is laid to rest at the outset. Springer v. Bd. of Education, 117 W. Va. 413, 185 S.E. 692 (1936). It 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. County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946); Delardas v. County Court, 155 W. Va. 776, 186 S.E.2d 847 (1972). West Virginia Code Chapter 5, Article 5, is entitled, "Salary Increase for State Employees." In Sections 1 and 2 of this Article, the incremental adjustment is referred to as a salary increase no less than five times. That this salary increase is incremental in nature is likewise established five times. "Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 1, Courtney v. State Dep't of Health, ____ W. Va. ____, 388 S.E.2d 491 (1989). See also 61 Op. Att'y Gen. 29 (1985). Having determined that the adjustment is clearly an incremental increase in the salaries of State employees, it is now necessary to determine the period of time during which the increase is earned.

West Virginia Code § 12-3-13 (1985) provides: "No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." This office has previously opined that the incremental salary increases for State employees provided for in W. Va. Code §§ 5-5-1 and -2 constitute increases in the annual salaries of all eligible State employees, and may not be lawfully paid out of the State treasury until after services have been rendered to the State. 61 Op. Att'y Gen. 29 (1985).

The Supreme Court of Appeals has twice held that the W. Va. Code § 5-5-2 incremental increases represent an adjustment in salary for services previously performed. Referring to the first incremental salary increase payable on July 1, 1985, the High Court said: "The statute is designed to provide supplemental salary increments based not only on (the number of years of) past services but for services rendered since the enactment of the statute." State ex rel. Erwin v. Gainer, No. 16791 (August 2, 1985) (per curiam). Holding that employees who were terminated on June 30, 1989, were entitled to their incremental salary increases payable on July 1, 1990, the Supreme Court of Appeals stated:

> As noted in Erwin . . . W. Va. Code, 5-5-2 [1984] provides compensation, as part of the regular pay, for services that were previously rendered. In this case, the petitioners rendered services throughout all of the fiscal year ending June 30, 1989. Therefore, the petitioners are entitled to receive the annual incremental salary increase for that fiscal year.

Courtney v. State Dep't of Health, ___ W. Va. ___, 388 S.E.2d 491 (1989).

Finally, it should be noted that the United States Department of Labor has determined the statutory increase "constitutes additional earnings for the completed year and is payment for services rendered throughout the year." Letter dated August 26, 1985, to Acting Director of Personnel, West Virginia Civil Service System, from Eldon F. Spurlock, Area Director. (See attached Exhibit.)

Considering (1) the constitutional prohibition against after-the-fact bonus forms of compensation, (2) the constitutional and statutory prohibitions against payments for services not yet rendered, (3) existing case law, (4) prior opinions of this office, as well as, (5) the position of the United States Department of Labor, it is concluded that this salary adjustment represents payment for prior services, and is not prospective in nature.

The remaining issue to be examined is whether an employee who resigns, is terminated, or retires during the fiscal year, is entitled to a pro rata share of the annual incremental salary increase. Likewise, this question must be answered affirmatively. This conclusion is based primarily upon the Supreme Court of Appeals' decisions in Erwin and Courtney. In Erwin, the Court found the incremental increase to be a "supplement [to] the regular pay of eligible State employees . . . ." Wages or salaries earned are wages or salaries payable. Any other result would result in the imposition of an unwarranted penalty upon those who resign or retire. That the accrued but not yet paid incremental salary increases must be paid upon termination of employment during the fiscal year was clearly required by the High Court in Courtney:

> Examining the statute as a whole, we do not agree with the respondents' contention that in order to receive such salary increase, one would have to be employed on the first day of the ensuing fiscal year. Rather, it is clear that the first day of the ensuing fiscal year is merely the date upon which such salary increase is to be paid.
>
> As noted in Erwin and previously stated herein, W. Va. Code, 5-5-2 [1984] provides compensation, as part of the regular pay, for services that were previously rendered. In this case, the petitioners rendered services throughout all of the fiscal year ending June 30, 1989. Therefore, the petitioners are entitled to receive the annual incremental salary increase for that fiscal year.
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> Accordingly, we hold that W. Va. Code, 5-5-2 [1984] does not require an employee to be employed on the first day of the ensuing fiscal year in order to be entitled to receive an annual incremental salary increase provided by that statutory provision. Rather, the first day of any fiscal year is the date upon which the incremental salary increase is to be received.
> (Footnotes omitted.)

388 S.E.2d at 494.

Considering that the W. Va. Code § 5-5-2 incremental increase constitutes part of an eligible state employee's regular pay for services previously rendered, any such employee has a statutory right to any accrued pro rata share of that increment owing but not due on his final day of employment. By entitlement to a pro rata share, it is meant that an employee who does not work an entire fiscal year is entitled to a fractional portion of the total

increment to which the employee would have been entitled had he been employed during the entire fiscal year. The fraction would have as a numerator the number of pay periods employed, and as a denominator the number twenty-four if the employing agency pays its employees twice monthly. Any other pay plan would require the use of a fraction that would similarly provide the employee with that portion of the salary increment he earned during his final year of employment.

This office similarly opined on August 17, 1988, when it advised the State Auditor, Glen B. Gainer, Jr., that the W. Va. Code § 5-5-2 increase is an integral part of an employee's gross annual salary, and such increment is not to be deleted or subtracted in the course of determining the value of payment for accrued and unused annual leave days upon termination of employment. It remains the position of this office today that such a deletion or subtraction for any purpose would unlawfully reduce the value due and payable for past services rendered.

Sincerely,

ROGER W. TOMPKINS
ATTORNEY GENERAL

By: C. TERRY OPEN
SENIOR ASSISTANT ATTORNEY GENERAL

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Attachment