

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>September 6, 2006</p>	<p>No. I06-003 (R06-024)</p> <p>Re: Amending Contracts of Certain School Employees to Include Monies Appropriated for Increases in Compensation of those Employees</p>
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To: Donald Peters  
Miller LaSota & Peters PLC

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), you submitted for review an opinion you prepared for the Washington Elementary School District dated June 7, 2006, and an addendum to that opinion dated July 14, 2006. This Office concurs with your opinion that previously executed contracts between a school district or charter school (“district”) and district nonadministrative employees may be amended to reflect increases in salary and benefits as a result of the recent legislative appropriation of \$100 million without violating either Article IX, § 7 (the “Gift Clause”) or Article IV, part 2, § 17 (the “Extra Compensation Clause”) of the Arizona Constitution. We issue this Opinion to provide guidance to all Arizona school districts and charter schools concerning the issue because of its broad statewide applicability. *See* Ariz. Att’y Gen. Op. I04-009 (review may be granted when facts have broad statewide applicability).

## **Question Presented**

Whether a school district or a charter school may amend a contract between the district and nonadministrative personnel to increase the salary and benefits of a school district's nonadministrative employees, including the district's teachers, which is funded by a special legislative appropriation specifically targeted for that purpose.

## **Relevant Factual Background**

In June of 2006, the Arizona Legislature passed House Bill 2874 as part of the budget process for fiscal year 2006-07. 2006 Ariz. Sess. Laws, ch. 353. Section 27 of HB 2874 (the "Legislation") contains an appropriation in fiscal year 2006-2007 of \$100 million from the General Fund "to provide salary and benefit increases for school district and charter school nonadministrative personnel:"<sup>1</sup>

Sec. 27. Appropriation; basic state aid; base level increase

A. The sum of \$100,000,000 is appropriated from the state general fund in fiscal year 2006-2007 to the department of education to fund the increase in the base level authorized in section 15-901, subsection B, paragraph 2, Arizona Revised Statutes, as amended by this act.

B. The funding appropriated in subsection A of this section shall be used to provide salary and benefit increases for school district and charter school nonadministrative personnel.

2006 Ariz. Sess. Laws ch. 353, § 27.

The Legislation was enacted after many districts had executed contracts with nonadministrative personnel for employment in the 2006-2007 fiscal year. For instance, Arizona school districts are required to enter into contracts with continuing certificated

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<sup>1</sup> In this Opinion, the phrases "nonadministrative employee compensation increases" and "compensation increases for nonadministrative employees" mean "salary and benefit increases for school district and charter school nonadministrative personnel" as used in the Legislation.

teachers for the following school year between March 15 and May 15. A.R.S. §§ 15-536, -538.01. While charter schools are not required to enter into contracts with continuing teachers by any specific date, many charter schools had likely done so at the time the Legislation became law to ensure that the school was fully staffed for the following school year. In addition, because many districts enter into contracts with nonadministrative, non-certificated personnel well in advance of the upcoming school year, many of these contracts may have been executed before the Legislation was enacted.

The legal issues raised in your letter apply only to those contracts between the district and nonadministrative employee contracts that were executed before the Legislation was enacted. The constitutional issues addressed in your letter and this Opinion are not implicated by contracts executed after the Legislation's enactment because presumably those contracts incorporated the increases that the Legislation authorized.<sup>2</sup>

## Analysis

### **I. The Gift Clause.**

A change to a contract to increase compensation may violate the Gift Clause of the Arizona Constitution. The Gift Clause, however, does not proscribe the implementation of HB 2874 with regard to previously executed contracts.

The Gift Clause in article IX, § 7 of the Arizona Constitution states:

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<sup>2</sup> Likewise, as addressed in your opinion, contracts that include an appropriate enforceable contingency clause to encompass increased funding may be amended in accordance with the contingency without implicating the constitutional issues addressed in this Opinion. *See* Ariz. Atty. Gen. Ops. I84-034 and I85-093.

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

The Gift Clause is “intended to prevent government from depleting the public treasury by disbursing public funds for the private or personal benefit of private individuals, corporations, or associations.” *McClead v. Pima County*, 174 Ariz. 348, 358, 849 P.2d 1378, 1388 (App. 1992); *see also Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984). The Arizona Attorney General has previously concluded that the Gift Clause prohibits a school district from raising a teacher’s compensation beyond the amount that the teacher previously has contractually agreed to accept in exchange for the performance of the teacher’s duties. *See Ariz. Att’y. Gen. Ops.* I80-027, I83-065. “[I]f a district teacher agrees to perform his duties at the salary rate specified in his written contract, the district may not pay the teacher an additional amount for the same services. Payment for services which a teacher is already legally obligated to perform would constitute a gift in violation of” the Gift Clause. I83-065. These earlier opinions, however, did not address the ability to amend a contract to incorporate amounts subsequently appropriated by the Legislature for salary increases for certain personnel.

To comply with the Gift Clause, a transaction involving a distribution of public monies must be made for a public purpose and there must be consideration such that the value of the benefit received by the public is not “far exceeded by the consideration being paid by the public.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. “The reality of the

transaction both in terms of purpose and consideration must be considered.” *Id.* Thus, the determination of whether a particular transaction violates the Gift Clause is made on a case-by-case basis, applying the criteria outlined in Arizona case law to the facts of the particular transaction.

As the Arizona Court of Appeals observed, “[a] government expenditure satisfies the [Gift Clause] if made for a public purpose, which is a flexible concept.” *McClead*, 174 Ariz. at 358, 849 P.2d at 1388. Further, the Arizona Supreme Court has recognized that “[a] panoptic view of the facts of each transaction is required.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. When analyzing legislation, courts have presumed that the Legislature has acted for a public purpose. *McClead*, 174 Ariz. at 358-59, 849 P.2d at 1388-89.

For example, in *McClead*, the court rejected a taxpayer’s claim that increases to already contracted pension benefits violated the Gift Clause. In arguing that there was a public purpose to a pension benefit increase, the defendant cited the public purposes that might justify such increases to pensions, such as “satisfy[ing] the state's moral obligation to remedy the effect of inflation,” “serv[ing] as a recruiting inducement for prospective employees” and “motivat[ing] current civil servants to remain” employed. *Id.* The court agreed, holding that the challenged increase served a public purpose.

The salary increases authorized by the Legislation undeniably serve an important public purpose. The Legislature is charged with enacting laws for the establishment and maintenance of a general and uniform public school system. Ariz. Const. art. XI, § 1. The Legislature can appropriately decide to grant compensation increases to teachers for the same reasons cited by the court in *McClead*. Increases in nonadministrative

employee compensation help ensure that Arizona schools will have high quality personnel by encouraging good teachers to stay within the State and by inducing qualified teachers from outside the State to teach in Arizona.

The second prong of the test--to determine whether a particular transaction violates the Gift Clause--requires an analysis of the consideration for the benefit conferred upon the private party (the nonadministrative district employee) as a result of the transaction. In order to comply with the Gift Clause, “[t]here must also be ‘consideration’ which is not ‘so inequitable and unreasonable that it amounts to an abuse of discretion,’ thus providing a subsidy to the private entity.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357 (internal citation omitted). “[I]n reviewing such questions, the courts must not be overly technical and must give appropriate deference to the finding of the governmental body.” *Id.*

Thus, under *Wistuber*, there must be a determination that the nonadministrative employee compensation increases would not be clearly disproportionate to the anticipated benefits to the State. The compensation increases that would result from this legislative appropriation, as we understand it, would probably range from a few hundred dollars to perhaps a thousand dollars per nonadministrative employee. Applying the *Wistuber* test, the nonadministrative employee compensation increases resulting from the Legislation are not clearly disproportionate to the substantial public benefit that is anticipated to result from the infusion of funding into Arizona’s public education system. Thus, the value to be received by the public under the Legislation is not exceeded by the consideration being paid by the public.

Under the narrow facts addressed in your opinion, a district would not violate the Gift Clause by amending previously executed contracts between the district and nonadministrative employees in light of the Legislation. Unlike factual situations addressed in previous opinions of this office, the raises arise from a special appropriation enacted for the explicit purpose of funding salary and benefit increases for district nonadministrative personnel. Here, the Legislation expressly requires a district to use the monies it receives for this precise purpose, and no other. Under these facts, a district may provide current fiscal year compensation increases to its nonadministrative employees pursuant to the legislative mandate in the Legislation without violating the Gift Clause.

## **II. The Extra Compensation Clause.**

Amending contracts to incorporate the Legislation's pay increases also does not violate the Extra Compensation Clause in Article IV, part 2, § 17 of the Arizona Constitution. This clause states:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer . . . be increased or diminished during his term of office . . . .

The first section of the Extra Compensation Clause, which prohibits the grant of extra compensation to public officers and employees under contract, was addressed in *Rochlin v. State*, 112 Ariz. 171, 540 P.2d 643 (1975) as a result of legislative changes to the benefits paid to Public Safety Personnel Retirement System ("PSPRS") members. The legislation at issue in *Rochlin* changed retirement benefits available to public employees, such that, in some cases, the number of years that an employee had to work to qualify for a specified retirement benefit was reduced. The plaintiffs argued that this

statutory change violated the Extra Compensation Clause because many public employees would immediately receive increased retirement benefits. The Arizona Supreme Court disagreed, holding that the challenged increases in pension benefits did not violate the Extra Compensation Clause because the increases served the important and constitutionally valid purpose of inducing public employees to remain in public service:

Prior service credit may have a tendency to increase the payments made to the teacher during the time he or she teaches, between the passage of the act and the time of retirement, but this does not contravene the constitutional provision. It may be considered in the nature of an inducement to have experienced teachers remain part of the public school system. If so construed, the act is still valid.

112 Ariz. at 178, 540 P.2d at 650 (citing *Gubler v. Utah State Teachers' Retirement Board*, 113 Utah 188, 192 P.2d 580 (1948)).

The court in *Rochlin* recognized that, as a result of the legislation at issue, public employees not previously eligible to retire could immediately become eligible to retire.

The court ruled, however, that such a result was not improper:

The 1971 amendment to the act allowed earlier retirement than that formerly provided, and it is argued that, as to those who took advantage of early retirement, the retirement benefits were a payment for past services because it was certainly not an inducement for their continued service. With respect to such employees the payment was not for past services. The act had a dual purpose: to . . . induce younger experienced officers to remain in service and to induce older officers to retire to provide opportunity for replacement by younger personnel. Either purpose is constitutional and not payment for past service.

*Id.*

As discussed above, the Legislation serves the valid public purposes of encouraging the retention of qualified and experienced public school employees and inducing other qualified and experienced public school employees to relocate to Arizona.



Based on *Rochlin*, the increase in nonadministrative employee compensation as a result of the Legislation does not violate the Extra Compensation Clause.

The second prohibition of the Extra Compensation Clause does not apply to the Legislation because the term “public officer” as used in that clause does not include a teacher or other nonadministrative school district employee. The position of a “public officer” under the Extra Compensation Clause “must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an ‘office,’ while one which lacks any of them is a mere ‘employment.’” *State Consol. Pub. Co. v. Hill*, 39 Ariz. 21, 31, 3 P.2d 525, 529 (1931) (emphasis in original); see also *State ex rel. Colorado River Commission v. Frohmiller*, 46 Ariz. 413, 424, 52 P.2d 483, 487 (1935) (holding that “the provisions of [the Extra Compensation Clause] do not apply to public officers who have no fixed or definite term of office but hold merely at the will of the appointing power”). Public school teachers and other nonadministrative employees are not invested with sovereign functions of the government nor do they have fixed or definite terms. Therefore, that portion of the Extra Compensation Clause that prohibits an increase or decrease in compensation during a public officer’s term in office does not apply to nonadministrative school district employees.

### **Conclusion**

Previously executed contracts for the 2006-2007 school year of nonadministrative employees of school districts and charter schools may be amended to add compensation

increases as a result of HB 2874, without violating either article IX, § 7 or article IV, part 2, § 17 of the Arizona Constitution.

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