

June 20, 2017

Dr. Sam Minner, President
 President's Office
 New Mexico Highlands University
 Box 9000
 Las Vegas, NM 87701
president_office@nmhu.edu

Re: Improper Implementation of Fringe Benefits pursuant to negotiated contract

Dear Dr. Minner:

Our office represents the NMHU Faculty Association. I am in receipt of a copy of an email dated May 5, 2017, in which you advise faculty that the effective date of the reallocation of insurance payments and overload payments will be May 5, 2017. The effective date of the implementation should be July 1, 2016, the start of the negotiated contract.

Dr. Jenkins has advised that University administration will not implement these negotiated benefits because they have obtained legal advice that applying these payments retroactively would constitute a violation of the New Mexico Constitution, Article IX, Section 14, commonly known as the anti-donation clause. Generally, the anti-donation clause forbids state entities from making donations to private individuals without consideration. *State of NM et al v. Lewis et al*, 2007-NMCA-008, ¶49. Various attorney general opinions have expressed that the Anti-Donation clause prohibits retroactive payment of wages to state employees. See *Att'y Gen. Op. To Cisco McSorley*, June 4, 2004; No 7107 (1971); No. 62-28 (1962). However, all of these opinions speak to "wages" and/or "salary". In this case, there will be no change to the wages or salary paid to the individual employees. The base pay will remain the same. Instead, there will be a change to fringe benefits, which is treated differently under the law and for which there is no constitutional prohibition for retroactive implementation.

Fringe benefits, like insurance and overload payments, are excluded from salary. See *Att'y Gen. Op. To Shawn Lerch*, June 22, 2015; 88-23 (1988); 88-73 (1988). See also *Treloar v. County of Chavez*, 2001-NMCA-074, ¶32 (holding that severance payment did not violate

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the anti-donation clause). In the Attorney General Opinion to PERA (88-23), the AG's office differentiated salary from fringe benefits upon which retirement payments could be calculated. The AG relied, in large measure upon the definition of salary under the worker's compensation statutes and under the PERA rules. Under both, salary includes only the regular base pay received by an employee, but does not include overtime pay, allowances, lump sum payments, employer contributions to retirement or other fringe benefits, and any other form of irregular payments. See NMAC 2.80.100.7(Q). The AG found that including these items into a calculation of salary for the purpose of establishing rate of pay in retirement would constitute a violation of the anti-donation clause because it would be considered a retro-active wage increase. Because the payment insurance re-allocation and overload are payments for fringe benefits, the anti-donation clause is inapplicable in this instance and does not prohibit the University from abiding by the terms of the newly negotiated collective bargaining agreement retroactive to July 1, 2016.

Another reason the anti-donation clause is inapplicable in this instance is that the University receives consideration for the benefits paid. In the Attorney General Opinion to Lerch, the AG's office explains that the crucial issue is whether to allocation of funds is done without consideration. In this instance, the re-allocation of insurance and overload payments are being made for retention purposes: NMHU wants to keep its faculty and while it cannot pay an increased salary, it can provide other fringe benefits in an effort to retain employees. Further, as it relates to overload payments, these payments are made in an effort to encourage current faculty to teach additional course beyond the required course load. These reasons are sufficient considerations for the payment of these fringe benefits. See also Att'y Gen. Op. 88-73 (holding that sick leave buy-back plan is compensation for remaining in employment and not a violation of the anti-donation clause).

Finally, it has been the past practice of the University to retroactively apply benefits negotiated under the collective bargaining agreement back to the start of the contract. On at least two other occasions, the University has retroactively applied the terms of the agreement. This should be so particularly in this instance when much of the delay, although not intentional, was due to the University's actions. At the start of the negotiation process, there were changes in administration that delayed the negotiations. Additionally, once the contract had been fully negotiated in January 2017, the University delayed final ratification because it was "typing up" the full agreement. Moreover, during the entire negotiating process, the University never advised that it would not follow past practice and retroactively implement the agreement. This could lead to a claim of bad faith bargaining.

Notwithstanding, and without having to agree or disagree over any of the above language, this entire controversy could be avoided by following the advice of the Attorney General's office as outlined in their opinion to Cisco McSorley in 2004, where it said, "The [University] might, consistent with the constitution, pay its employees a bonus or one-time salary increase if the bonus or increase if the criteria for receiving it were include in the employees' compensation plan or agreement before services were rendered." Att'y Gen. Op. To Cisco McSorley (2004). Fringe benefits were already included in the compensation for employees starting in July 2016.

As such, the Union proposes that the University pay each bargaining unit employee a one-time bonus equal to the difference between what the employee received during the 2016/2017 school year and the amount they would have received had the contract's newly negotiated provision regarding insurance allocation and overload payment been in place since July 2016. This one-time bonus would be a retention bonus.

Please contact me or Dr. Jenkins to discuss this matter at your earliest convenience.

Sincerely,

THE JONES FIRM



ROXIE P. DE SANTIAGO

cc: Dr. Kathy Jenkins
Ignacio Sanchez, NEA UniServ