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Subject: Request for Legal Opinion Regarding Payment of Within-Grade Increases (WGs) and Lump-sum Bonus Payments

Requested by: Isidro K. Seman, Director of Personnel

Opinion of the Attorney General

This opinion is in response to the request of the Director of Personnel for a legal opinion that discusses various issues regarding the payment of within-grade increases and merit increases pursuant to 1 CMC § 8215 and lump-sum bonus payments pursuant to 1 CMC § 8213.

Short Answer

Even if the Governor orders the resumption of within-grade increases, merit increases, and bonuses to civil service employees, these payments cannot take effect until the Department of Finance certifies that funds are available for paying these benefits.

Background

1 CMC § 8215 establishes within-grade and merit pay increases for civil service employees: An employee shall be granted a one-step, within-grade increase upon completion of 52 consecutive calendar weeks of sustained satisfactory work performance. An employee shall be awarded, in addition, a merit increase (not exceeding one step increase in the base salary) by achieving an overall performance appraisal average score equivalent to “outstanding/exceptional” upon completion of 52 consecutive calendar weeks of sustained superior work performance. Such additional merit increases shall not alter the waiting period required for qualifying for the next within-grade step increase. No employee shall be compensated above the maximum step prescribed for the employee’s pay level. All requests for within-grade and merit increases shall be acted upon within 90 working days after submitting the request and all supporting documents to the office of personnel. All such requests not acted upon within 90 working days shall be deemed granted upon availability of funds.

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1 CMC § 7405 provides general governance for salary increases:

...No person, including the Civil Service Commission, may reclassify or adjust the salary of a government employee whose salary is paid from appropriations from the general funds without first receiving from the Office of Management and Budget and the Department of Finance certification that lawful and sufficient funds for that purpose are available.

Civil service employees whose salary has been frozen may receive bonus payments pursuant to 1 CMC § 8213(g):

...Upon continued satisfactory performance, the employee is entitled to such bonus once every two years thereafter using the same formula, provided that the bonus shall only apply if the necessary funding is available by appropriation or lawful reprogramming....

These within-grade increases, merit increases, and bonus payments were last made in September of 2001. Atty. Gen. Op. No. 06-06 (May 30, 2006). On November 7, 2001, Governor Pedro Tenorio requested the implementation of financial austerity measures for the civil service system.¹ Governor Juan Babauta formally suspended the within-grade and merit increase program by Directive No. 223 on January 2, 2003. This Directive provided that it “shall remain in effect until rescinded in writing or superseded by the adoption of pertinent rules and regulations.” *Id.* at 2.

Discussion

1. Within-Grade Increases

Within-grade increases are mandatory. “An employee *shall* be granted a one-step, within-grade increase upon completion of 52 consecutive calendar weeks of sustained satisfactory work performance.” 1 CMC § 8215 (emphasis added). However, no person shall “reclassify or adjust a salary of a government employee... without *first* receiving from the Office of Management and Budget and the Department of Finance certification that lawful and sufficient funds for that purpose exist.” 1 CMC § 7405 (emphasis added). When read together, these statutes create a procedure for within-grade increases. Once an employee completes 52 consecutive weeks of sustained satisfactory work performance, the Civil Service Commission must sign off on a within-grade increase for the employee. This request for an increase then goes to the Office of Management and Budget and the Department of Finance, who must certify that the funds for the increase exist. If the government cannot afford the pay increase, the request remains in the “In box” until these agencies determine that funds for this purpose exist.

This procedure is consistent with Finance’s constitutional authority to “control and regulate the expenditure of public funds.” NMI Const., art. X, § 8. If another agency were to order Finance to

¹ The Office of the Attorney General and the Office of the Governor attempted to find this document, but could not. We know of its existence because it was referenced in the Commonwealth Register. 23 Com. Reg. 18747 (Nov. 23, 2001).

make payments without allowing Finance to certify that government could afford the payments, they would be infringing upon Finance's constitutional authority. This is also the process described in a previous Attorney General Opinion. "...[U]ntil funds are appropriated for within-grade and merit increases and the Office of Management of Budget and the Department of Finance both certify that lawful and sufficient funds for those increases exist, the salaries of government employees which are paid from the general fund may not be adjusted for such increases." Attorney General Opinion, Nov. 7, 2001.

Because the salary adjustment does not go into effect until Management and Budget and Finance certify that funds exist, employees who have not received within-grade increases are not entitled to retroactive pay.² "Where state law withholds an entitlement until certain conditions are met, the employee cannot acquire a property interest..." *Logan County Educ. Ass'n v. Logan County Bd. of Educ.*, 376 S.E.2d 340, 346 (W.Va. 1988) (internal citations omitted). 1 CMC § 7405 withholds the entitlement to a within-grade increase until OMB and Finance's conditions are met. Any within-grade increases that Civil Service has approved will go into effect once OMB and Finance approves of them. For some employees, this means that they will receive multiple within-grade increases at once.

Disapproval of retroactive pay increases is supported by case law in other jurisdictions. In *Nye v. University of Washington*, 260 P.3d 1000 (Wash. App. Div. 1 2011), the plaintiff was a professor at the University of Washington. Due to a decrease in funding, the university suspended merit raises for 2009 through 2011. The plaintiff sued for retroactive payment of a merit increase, claiming his contract entitled him to the raise. The Washington Court of Appeals found for the university, explaining, "[a] raise is an increase in future wage or salary.... [A] raise compensates for the performance of future work. Here, before Nye performed that future work during the 2009-2010 academic year, the merit raise had been properly suspended by the university." *Id.* at 1006.

Gubernatorial pronouncements of expenditure controls prevent the Civil Service Commission and OMB from submitting pay increases to the Department of Finance for approval. However, because of Finance's constitutional authority to control the expenditure of public funds, the Governor cannot prevent Finance from approving or denying pay increases.

2. Merit Increases

Merit increases function in much the same way as within-grade increases. Once an employee has qualified for a merit increase through superior work performance pursuant to 1 CMC § 8215, the Civil Service Commission must submit the request for merit increase to OMB and Finance for approval. The increase goes into effect once OMB and Finance certifies that funds exist. Employees are not entitled to retroactive increases.

² A previous Attorney General Opinion supported payment of retroactive pay increases; however, this Opinion did not cite any law to support this conclusion. Attorney General Opinion No. 06-06.

3. Bonuses

1 CMC § 8213(g)'s bonuses for employees are not restricted by 1 CMC § 7405 because that statute applies only to the reclassification or adjustment of salaries. A salary is "compensation for services... paid at regular intervals..." *Black's Law Dictionary* 1537 (10th ed. 2014). Because these bonuses are lump-sum payments, and do not affect the compensation that is paid at regular intervals, they are not salary adjustments.

Nevertheless, someone must still certify that "...the necessary funding is available by appropriation or lawful reprogramming." 1 CMC § 8213(g). The statute does not say who is responsible for making this certification. Given that the payment of a bonus is an "expenditure of public funds," the Department of Finance must undertake this responsibility. NMI Const., art. X, § 8.

The process for approving bonuses works very much like the process for pay increases. The Civil Service Commission certifies that the employee is entitled to a bonus under 1 CMC § 8213(g), and submits the certification to Finance.³ If Finance certifies that the funds exist, the employee receives the bonus. Again, the employee is not entitled to back pay for bonuses to which they were entitled when funds did not exist to pay the bonuses. *Nye, supra*.

Answers

This section provides answers to the questions posed by the Director of Personnel in his letter of July 13, 2015.

1. "Are the payments specified in the laws mandatory or optional?"

Within-grade increases and merit increases are mandatory because 1 CMC § 8215 states that they "shall" be granted. Bonuses are mandatory because 1 CMC § 8213(g) says that employees are "entitled" to receive them. Civil service employees must receive these payments at some point: the only question is when.

2. "Were the actions taken to halt the statutory payments appropriate without statutory changes?"

The actions taken by previous governors to stop the payments are ultimately irrelevant because the Department of Finance has the final authority to approve or deny pay increases and bonuses. Even if the Office of the Governor had not issued its directives suspending the payments, if Finance had determined the funds did not exist, the payments would not have been issued.

³ The Office of Management and Budget is not mentioned in 1 CMC § 8213(g), so it is not involved in the process of approving bonuses.

3. *“Are the unpaid WGIs due retroactively when funding is available?”*

As discussed above, no employee is entitled to a within-grade increase until after OMB and Finance have approved the increase. Because OMB and Finance did not approve these increases, they are not due retroactively.

4. *“Are the unpaid lump sum bonuses due retroactively when funding is available?”*

Again, no employee may receive a payment until after Finance has certified that funds exist, so lump sum bonuses are not due retroactively.

5. *“Who determines if funding is available?”*

Article X, section 8 of the Constitution makes Finance responsible for determining if funds are available.

6. *“Can a decision to re-start one benefit or the other take place without payment of any retroactive debts (if benefits are determined to be retroactively owed)?”*

Because the payments in question are not retroactively owed, this question is irrelevant.

7. *“Can individual departments determine that they have funding available and restart benefit payments for their department only?”*

Because the Department of Finance is constitutionally responsible for the control of public funds, individual departments may not restart benefit payments without Finance’s approval. In addition, because 1 CMC § 8215 requires the approval of the Office of Management and Budget before a within-grade increase or a merit increase goes into effect, departments cannot resume these increases without OMB’s approval. OMB is not involved in the bonus approval process.



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