VOLUME NO. 35 Opinion No. 89

ADMINISTRATIVE LAW—Interpretative rules, power to enact; APPROPRIATIONS—General salary increase for state employees; CONSTITUTIONAL LAW—Impairment of obligations of contracts; CONTRACTS—Union, impairment of obligations, statutory salary increase for state employees; LEGISLATURE—Powers, impairment of obligations of contracts; STATE—Employees, general statutory salary increase; STATUTES—Vested rights, annual percentage salary increase. Constitution of Montana, 1972, Article II, section 31; Montana Session Laws, 1974, House Bill No. 747; section 31-105, R.C.M. 1947.

HELD: 1. The office of budget and program planning has the authority to make interpretative rules for the purpose of administering House Bill 747.

2. The legislature did impair the obligations of contracts entered into between union bargaining units and state agencies by enacting H.B. 747 if the salary increases or benefits to be received under those contracts would be diminished in any way.

3. State employees under union contracts which have been impaired by H.B. 747 are entitled to the salary increases as provided for by their contracts and not as provided for in H.B. 747.

4. State employees with vested statutory salary increases are entitled to the salary increase in H.B. 747 in addition to their mandated statutory increases.

June 21, 1974

Mr. Keith L. Colbo, Director
Office of Budget & Program Planning
State Capitol
Helena, Montana 59601

Dear Mr. Colbo:

You have requested my opinion on the following questions relating to House Bill 747, enacted by the Forty-Third Legislative Assembly and signed into law by the Governor on March 27, 1974, providing for a general salary increase for state employees:

1. Does the office of budget and program planning have the authority to make interpretative rules for purposes of administering House Bill 747?

2. Did the legislature by enacting House Bill 747 impair the obligations of union contracts negotiated in good faith between bargaining units and state agencies?

3. If the obligations of union contracts have been impaired, are the employees covered by such contracts entitled to the salary increases mandated in House Bill 747, or are the salary increase rates contained in the various contracts applicable?

House Bill 747, after appropriating certain monies from the general fund, provides in pertinent part:

> The purpose of this appropriation is to provide a general state employee salary adjustment effective January 1, 1974. All state employees, with the exception of those employees whose salaries are set by law, are to be included. All state employees shall receive a salary increase of thirty dollars ($30) per month, pro-rated for less than full-time employment. In addition, all state employees shall receive a two per cent (2%) salary increase as of July 1, 1974. This salary adjustment shall apply only for employees of record as of the date of passage and approval of this act. Administration of the appropriation is assigned to the budget bureau, department of administration, for distribution. ... **This general state employee salary adjustment is intended in lieu of all forthcoming, broad-based salary increases in the 1975** biennium. (Emphasis supplied)

In response to your first question, the legislature provided in H.B. 747 that: "Administration of the appropriation [for the general salary adjustment] is assigned to the budget bureau, department of administration, for distribution." Chapter 42, Laws of Montana, 1974, Senate Bill 488, "An Act Amending Sections 79-1012 and 82A-202, R.C.M. 1947, And Reestablishing The Position Of Budget

Director Within The Office Of The Governor; And Providing An Effective Date," transferred the functions of the budget bureau, department of administration, to the budget director of the governor's office.

The law is well settled that the power to adopt legislative or substantive rules is predicated upon a specific and explicit delegation of statutory authority. **Civil Aeronautics Board v. Delta Air Lines,** 367 U.S. 316 (1961). There is no specific statutory authority granting the director of the office of budget and program planning the power to promulgate substantive rules and regulations for administering the appropriation for general state employee salary adjustments as provided for in H.B. 747. However, it appears that the delegation to an agency of power to administer a statute carries with it the authority to adopt reasonable procedures necessary in carrying out its administrative tasks, and the authority to make interpretative rules of the statute it administers. (See: K. Davis, **Administrative Law Treatise,** §§5.01, et seq., West Publishing Co., 1970 Supplement, and 1 Cooper, **State Administrative Law,** Bobbs-Merrill Co., Inc., (1965), pp. 174-176.)

Courts have recognized the distinction between interpretative rules and substantive rules issued by an administrative agency. Substantive legislative rules "create law ... whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." **Gibson Wine Co. v. Snyder,** 194 F.2d 329, 331 (1952). Thus, an interpretative rule is merely an expression of the agency's opinion in regard to the statutes that it is required to administer. In this case, the power to adopt interpretative rules does not authorize the budget director to promulgate substantive rules which would create new rights or obligations or diminish existing ones.

Thus, the budget director has the power, without specific statutory authority, to adopt interpretative rules necessary to clarify and administer the provisions of H.B. 747.

Your remaining questions must be considered jointly. H.B. 747 contains the following language: "This general state employee salary adjustment is intended in lieu of all forthcoming, broad-based salary increases ..." Pursuant to your budget directive of April 12, 1974, in reference to rules for salary adjustments as authorized by H.B. 747, you have interpreted the above phrase as follows:

> 3. In lieu of all forthcoming, broad-based salary increases
>
> (a) this act supersedes all existing salary plans and agreements applicable to any group or class of state employees, including longevity increases, salary incremental plans, and union contracts, both written and oral.

The plain meaning of the statutory language appears to support your interpretation. Furthermore, the third reading of H.B. 747, in the 1974 session of the House of Representatives, contained the following language:

> This appropriation is not intended to interfere with written salary increment plans in existence by contract or other employee-employer agreements that may be in effect at the time of passage and approval.

This provision, had it been enacted, would have excluded salary increases contained in contracts and employer-employee agreements from the definition of "broad-based salary increases;" however, the report of the Free Joint Conference Committee recommended that this provision be stricken, and subsequently it was stricken when the senate and house adopted the Conference Committee Report. "The report of a conference committee appointed to adjust the differences between two houses as to the proper content of a proposed bill ... is resorted to as an aid in construing ambiguous statutes." 2A Sutherland, **Statutory Construction,** §48.08, at 207 (4th Ed. 1972).

Therefore, it would appear that H.B. 747 was intended by the legislature to be in lieu of all other salary increment plans, longevity increases, and union contracts. However, the legislature cannot enact into law that which is constitutionally prohibited, nor may an act of the legislature be administered in an unconstitutional manner.

Article II, section 31, of the Montana Constitution provides:

> **No** ex post facto law nor any **law impairing the obligation of contracts,** or making any irrevocable grant of special privileges, franchises, or immunities, **shall be passed by the legislature.** (Emphasis supplied)

The Supreme Court of Montana, in dealing with an identical provision in the 1889 Montana Constitution, stated in **State Savings Bank v. Barret,** 25 Mont. 112, 119, 63 P. 1030 (1900):

> That which binds a party to the fulfillment of his agreement is the obligation of a contract. It consists of the duty which the law imposes upon the parties to perform their agreements. [Cites] The duty which the law casts upon a party to comply with the terms of the contract which he has promised to perform, is therefore the obligation of his contract. Impairment of this obligation by state legislation is prohibited. (Section 10, Article I of the Fedeal Constitution; Section 11 of Article III of the Constitution of Montana.)
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> ... A statute which changes the terms of an agreement by imposing new conditions, or dispensing with those expressed or implied is a law which impairs the obligation of a contract, for such a law relieves the parties from the moral obligation of performing the original stipulations of the contract and prevents their legal enforcement. [Cites] The degree of impairment is immaterial; a law lessening or increasing the obligation, or dispensing in even the slightest degree with its force, is repugnant to the fundamental law of the land.
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> ... The state when it contracts as a person has no reserved right to withdaw or destroy by legislative action the effect of its promise which at the time it was made was founded upon a valuable consideration.

In construing a similar phrase in the Constitution of the United States, the United States Supreme Court stated:

> One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force. **Bank of Minden v. Clement,** 256 U.S. 126 (1921)

Clearly, if the parties to a contract have been prejudiced by the dimunition in value of that contract or deprived in any manner of the benefits of that contract, is is an impairment of the contractual obligation. Therefore, to the extent that H.B. 747 impairs contractual rights, it is null and void as violative of the Constitution of the United States and the Constitution of Montana.

Union contracts between bargaining units and state agencies which provide for higher salaries during the 1975 fiscal year than are provided for in H.B. 747, thus, are not superseded by that legislation and remain valid. However, since the legislature had apparently intended to invalidate these union contracts by enacting H.B. 747, it was obviously not the legislative intent that employees covered by union contracts should be entitled to the benefits of H.B. 747 in addition to salary increases under the contracts. If the obligations of a union contract have been impaired by the legislature in enacting H.B. 747, the employees covered by such contract are entitled to the salary increase contained in the contract and not to that increase contained in the legislation.

An additional question is raised by the language of H.B. 747 under separate statutes which grant state employees an annual percentage salary increase.

Section 31-105,Revised Codes of Montana, 1947, is an encompassing statute setting out the requirements, provisions, training and disciplinary action covering uniformed highway patrolmen. After providing for base salaries for uniformed personnel subject to the approval of the Board of Examiners, section 31-105 (2) (b) provides:

> These salaries shall be increased one percent (1%) per year for each additional year of service.

This mandated statutory salary increase is a vested right, contractual in nature, which cannot be annulled or impaired by a subsequent statute. (See: **Clarke v. Ireland,** 122 Mont. 191, 199 P.2d 965 (1948) **Indiana ex rel. Anderson v. Brand,** 303 U.S. 95 (1938). Further, the legislature in enacting H.B. 747 did not repeal the language granting the per annum salary increase contained in section 31-105 (2) (b), supra. It is a general rule of statutory construction that the legislature is presumed to have enacted law with existing law in mind. **In re Wilson's Estate,** 102 Mont. 178, 56 P.2d 733 (1936). Therefore, it may be presumed that H.B. 747 was not intended to supersede section 31-105 (2) (b), supra.

In addition, H.B. 747 provides:

> All state employees, **with the exception of those employees whose salaries are set by law,** are to be included. (Emphasis supplied)

Although the base salary for uniformed highway patrol employees is not set by law, the one percent yearly salary increase under section 31-105 supra, is part and parcel of these employees' yearly salaries and is established by law. A reasonable construction of legislative intent, therefore, is that the statutory salary increase contained in Section 31-105, supra, was not meant to be included as a "broad-based salary increase" within the meaning of H.B. 747 and, thus, the mandated statutory increase of section 31-105, supra, was not superseded by that legislation.

Since H.B. 747 was intended as a general salary adjustment to benefit all state employees, and since the legislature has not specifically repealed section 31-105, supra, these employees are entitled to the one percent annual salary increase contained in section 31-105, supra, in addition to the salary benefits of H.B. 747. Clearly, the vested statutory salary rights in section 31-105 are in addition to H.B. 747. To hold otherwise would deprive uniformed employees of the Montana highway patrol of salary benefits received under H.B. 747 by all other state employees.

It is apparent, therefore, that your interpretation of the language in H.B. 747, "in lieu of all forthcoming, broad-based salary increases," as superseding all existing salary plans including union contracts and longevity plans is not tenable in view of the constitutional guarantees against impairment of the obligation of contracts and vested statutory rights. Your interpretative rule in regard to that particular language should therefore be revised consistent with this opinion.

It should be noted that H.B. 757, section 11, provides a savings clause:

> If any section, subsection, sentence, clause, or phrase of this act is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

The incorporation of a severability clause like section 11 creates a presumption that the legislature would have enacted the law without the invalid portions. **State ex rel. City of Missoula v. Holmes,** 100 Mont. 256, 291, 47 P.2d 624 (1935); **Bacus v. Lake City,** 138 Mont. 69, 83, 354 P.2d 1056 (1960).

It is well settled that, where an act is void in part, the remainder, if complete in itself and capable of being executed in accordance with the apparent legislative intent, may be sustained. A severability provision expresses a legislative intent to enact whatever portion of the act is constitutional and operative and separately workable. **Maddox v. Board of State Canvassers,** 116 Mont. 217, 226, 149 P.2d 112 (1944).

To the extent, therefore, that H.B. 747 is not null and void as violative of constitutional prohibitions, it remains in full force and effect.

THEREFORE, IT IS MY OPINION:

1. The office of budget and program planning has the authority to make interpretative rules for the purpose of administering House Bill 747.

2. The legislature did impair the obligations of contracts entered into between union bargaining units and state agencies by enacting H.B. 747 if the

salary increases or benefits to be received under those contracts would be diminished in any way.

3. State employees under union contracts which have been impaired by H.B. 747 are entitled to the salary increases as provided for by their contracts and not as provided for in H.B. 747.

4. State employees with vested statutory salary increases are entitled to the salary increase in H.B. 747 in addition to their mandated statutory increases.

Very truly yours,

ROBERT L. WOODAHL
Attorney General