

VOLUME NO. 34

Opinion No. 29

PUBLIC EMPLOYEES - Severance pay. Article V, section 29, Montana Constitution; section 82A-107, R.C.M. 1947.

HELD: Public employees are not entitled to severance pay upon termination of employment.

December 14, 1971

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion as to whether a state agency may pay "severance pay" to terminated employees, either in the form of a lump sum payment or by retaining the employee on the payroll despite his failure to render services commensurate with his position.

Article V, section 29 of the Constitution of Montana provides:

"No bill shall be passed giving any **extra** compensation to any public officer, servant or employee, agent or contractor, **after** services shall have been rendered or contract made, nor providing for the payment of any claim made against the state without previous authority of law, except as may be otherwise provided herein." (Emphasis supplied)

This section of the constitution expressly prohibits the legislature from allowing extra compensation for past services rendered, which in effect severance payments are. In interpreting this provision as it related to appropriations by the state for the teachers' retirement fund, then Attorney General Foot found that such appropriations were not violative of this section. He stated that the appropriation did not apply:

"... to past services only with the view of giving extra compensation. It cannot be contended that the Act is as though the state said to the teachers, 'You have not been paid enough for your services, and we will now pay you what you deserve.' Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered." **19 Opinions of the Attorney General**, no. 17.

Severance pay is nothing other than saying to employees, "You have not been paid enough for your services, and we will now pay you what you deserve." Therefore, if a statute were passed, and none has been, expressly authorizing severance payments, it would be violative of this constitutional prohibition. If no statute could be valid which expressly authorized such payments, certainly no statute could be construed to impliedly authorize severance payments.

Furthermore, even if the constitutional prohibition were to be interpreted otherwise, statutory interpretation would lead to the same result. Prior to the governor's signing of an executive order establishing

the department of administration and repealing section 59-901, Revised Codes of Montana, 1947, this section provided:

“The state board of examiners of the State of Montana shall be resolution, fix and designate the number, compensation, term and tenure of office of all assistants, deputies, agents, attorneys, administrators, engineers, experts, clerks, accountants, stenographers and executive attaches of all civil executive state offices . . .”

An examination of the resolutions of the state board of examiners reveals that there are no express provisions relating to severance pay, whether by lump sum payment or otherwise. Thus, without acknowledging that the board did have the power to do so, no severance payments could legitimately be paid without the board’s having provided therefor.

Presently, the law in regard to compensation of public employees in executive departments, as written into executive reorganization in section 82A-107, R.C.M. 1947, states:

“(2) Except as otherwise provided within this act, each department head may: (a) Subject to law, and the state merit system if applicable, transfer employees between positions, remove persons appointed to positions, and change the duties, titles, and compensation of employees within the department.”

Nowhere, however, is there made mention of the department head’s having the power to allow severance pay. A well-settled maxim of administrative law is that a public agency or board has the power to do only that which is expressly granted by law. **State v. State Board of Equalization**, 133 Mont. 8, 319 P.2d 221 (1957). Therefore, it is apparent from statutory construction that the department heads do not have the power to allow severance pay.

In addition, the only statutory provisions conceivably relating to severance payments are found in Title 59, chapter 10, Revised Codes of Montana, 1947, which provide for payment of accrued vacation and sick leave benefits to terminated employees. A terminated employee would also be entitled to any accrued salary for work performed during the term of his employment. However, these payments are not in actuality “severance pay” but, rather, compensation earned by the public employee until the time of termination. Thus provisions providing for those payments would not be violative of Article V, section 29 of the Montana Constitution.

THEREFORE, IT IS MY OPINION that public employees are not entitled to severance pay upon termination of employment, other than

accrued vacation and sick leave benefits as provided by Title 59, chapter 10, R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL
Attorney General