

VOLUME NO. 37

OPINION NO.113

EMPLOYEES, PUBLIC - Severance Pay; LABOR RELATIONS - Collective Bargaining Agreements between school districts and their employees; provision for severance pay; SCHOOL DISTRICTS - Contracts with teachers and employees; provision for severance pay; TEACHERS - Severance pay; 1889 MONTANA CONSTITUTION - Article V, section 29; REVISED CODES OF MONTANA, 1947 - Sections 75-5933, 75-5934 and 75-6102; 34 OP. ATT'Y GEN. NO. 29.

- HELD: 1. Provision for severance pay in a collective bargaining agreement between a local school district and its employees, based on the number of years of service of the individual employees, is deferred compensation and is considered wages earned throughout the period of employment.
2. Pursuant to a collective bargaining agreement, a local school district may enter into contracts with its employees for severance pay if the payment is based on the number of years of service of each terminating employee.

8 February 1978

Honorable John B. Driscoll
Speaker of the House
Montana House of Representatives
Helena, Montana 59601

Dear Speaker:

You have requested my opinion concerning the following questions:

1. Is a provision for severance pay in a collective bargaining agreement between a local school district and its employees, where such provision is based on the number of years of service of each individual employee, deferred compensation and to be considered as wages earned throughout the period of employment?
2. Pursuant to a collective bargaining agreement, may a local school district enter into contracts with its employees which provide for severance pay upon termination of employment where such payments are based upon the number of years of service of each terminating employee?

In connection with your request, you have provided me with related factual background. Many local school districts have included severance pay provisions in their contracts with teachers as the result of collective bargaining between the districts and local units of the Montana Education Association. The agreements provide for severance pay upon a teacher's termination of employment. The amount of pay is related to the teacher's number of years of service.

The legality of these severance pay provisions has been cast into doubt by an August 6, 1976 legal opinion of the Flathead County Attorney. That opinion was rendered to the superintendent of the Flathead Public Schools and held that school districts may not legally include severance pay provisions in negotiated agreements with their employees. The opinion has apparently caused state-wide confusion concerning the validity of existing severance pay provisions and the future of contract negotiations between local school districts and their employees.

The Flathead County Attorney's opinion was expressly based upon a prior Attorney General opinion found at 34 OP. ATT'Y GEN. NO. 29 (1971), which held that payment of severance pay by a state agency to its terminated employees violated Article V, section 29 of the 1889 Montana Constitution. Opinion No. 29 held, "Severance pay is nothing more than saying to employees, 'You have not been paid enough for your services, and we will now pay you what you deserve.'" (Emphasis in the original.) Severance pay was held violative of Article V, section 29 of the 1889 Montana Constitution, which provided that "no bill shall be passed giving any extra compensation to any public officer, servant or employee ... after services shall have been rendered"

Opinion No. 29 is inapplicable to the present question. The constitutional prohibition contained in Article V, section 29 of the 1889 Constitution was not carried forward into the 1972 Montana Constitution. More importantly, a contractual provision for severance pay is a form of deferred compensation for actual services rendered and is not a gift or gratuity.

While the facts addressed in Opinion No. 29 are not clear, in context I understand the opinion to concern payments which were the result of a unilateral act of benevolence by the state agency involved. The payments were in the nature of gifts or gratuities. Contractual provisions for severance pay are different. Where arrived at through collective bargaining and based upon the length of an employee's service at the time of his termination, severance pay is deferred compensation which is generally considered as wages earned throughout the period of employment. Owens v. Press Pub. Co., 120 A.2d 442, 446, 20 N.J. 537 (1956). Thus, not even Article V, section 29 of the 1889 Montana Constitution would invalidate contractual severance pay provisions since that section condemned only increasing compensation after services had already been rendered. See Jones v. Burns, 138 Mont. 268, 293, 357 P.2d 22 (1960).

Local school districts are statutorily authorized to hire teachers and other employees. Sections 75-5933 and 75-5934, R.C.M. 1947. In the case of teachers, employment must be pursuant to contract. Section 75-6102, R.C.M. 1947. Although some provisions of employment agreements are regulated by statute, e.g., section 75-6102, R.C.M. 1947 (payment for holidays), the amount and specific form of compensation which districts may pay teachers and other district employees are not mandated by statute. As a general rule where mode and manner of executing a duty or power given a

political subdivision of the state is not expressly prescribed, any reasonable mode and manner of exercise is permitted. See Thompson v. Gallatin County, 120 Mont. 263, 184 P.2d 203 (1947). A collective bargaining agreement, which provides for payment of severance pay based upon number of years of service to teachers upon termination of employment, is a reasonable form and manner of compensation.

THEREFORE, IT IS MY OPINION:

1. Provision for severance pay in a collective bargaining agreement between a local school district and its employees, based on the number of years of service of the individual employees, is deferred compensation and is considered wages earned throughout the period of employment.
2. Pursuant to a collective bargaining agreement, a local school district may enter into contracts with its employees for severance pay if the payment is based on the number of years of service of each terminating employee.

Very truly yours,

MIKE GREELY
Attorney General