

**LETTER OPINION
2006-L-19**

June 16, 2006

The Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking whether Workforce Safety and Insurance (“WSI”) is required to provide all permanent employees the 4% across-the-board salary raises provided to permanent state employees during the 2005-07 biennium and whether those increases must be effective in August of 2005 and 2006. For the reasons stated below, it is my opinion that all permanent, non-probationary employees at WSI who otherwise do not have documented levels of performance indicating they are not meeting standards must be provided the 4% across-the-board increase in salary in each year of the biennium to the extent funds are available. It is my further opinion that the across-the-board increases must generally be provided in August 2006 and should have been provided in August 2005.

ANALYSIS

The legislation in question provides, in part:

Section 1. Legislative Intent – State Employee Compensation Adjustments – Guidelines. It is the intent of the fifty-ninth legislative assembly that 2005-07 biennium compensation adjustments for permanent state employees are to be increases of four percent beginning with the month of July 2005, to be paid August 2005, and of four percent beginning with the month of July 2006, to be paid in August 2006.

. . . .

Each agency appropriation for salaries and wages is increased by four percent the first year and four percent the second year of the 2005-07 biennium for these compensation adjustments.¹

In addition, this legislation provides a direct appropriation of specific amounts to listed agencies for purposes of providing additional compensation to state employees of the various identified agencies.²

¹ 2005 N.D. Sess. Laws ch. 25, § 1.

The primary focus in construing legislation is to ascertain the intent of the Legislature.³ In determining legislative intent, one must first look to the plain language of the statute. If the statutory language is ambiguous or of doubtful meaning, extrinsic aids including legislative history may be utilized.⁴ However, if the statutory language is clear and unambiguous, legislative intent must be presumed clear from the face of the statute, and that intent cannot be disregarded under the guise of pursuing the spirit of the legislation or invading the province of the Legislature by second-guessing what the Legislature truly intended.⁵

In addressing state employee compensation adjustments, the Legislature has periodically provided all or a portion of the increases as across-the-board raises, while at other times directing that agencies use the increases or a portion of the increases to address pay inequity, compression, exceptional performance and the like. In addition, the Legislature has at times only directed how compensation adjustments are to be handled for classified state employees, while at other times directing how adjustments are to be handled for all state employees or all permanent state employees.⁶ It is within the prerogative of the Legislature as the policy-making branch of state government to attach such restrictions to the use of appropriated dollars to be used for state employee salaries.⁷

In providing across-the-board increases for all “permanent state employees” for the 2005-07 biennium, it must be presumed that the Legislature meant what it said and used terminology with its ordinary and commonly understood meaning. The phrase “permanent state employees” refers to all regularly funded positions that are not of a limited duration⁸ and quite clearly extends beyond positions covered by the

² 2005 N.D. Sess. Laws ch. 25, § 3.

³ Stutsman County v. State Historical Society, 371 N.W.2d 321 (N.D. 1985).

⁴ Id.

⁵ Barnes County Ed. Ass’n v. Barnes County Special Ed. Bd., 276 N.W.2d 247 (N.D. 1979).

⁶ See, e.g., 1989 N.D. Sess. Laws ch. 4, § 3 (“It is the intent of the fifty-first legislative assembly that the 1989-91 compensation adjustments for state employees in the classified service are to be average increases of 7.1 percent. . . .”); 1995 N.D. Sess. Laws ch. 37, § 8 (“It is the intent of the fifty-fourth legislative assembly that the 1995-97 compensation adjustments for permanent state employees are to be increases of 2.0 percent. . . . In addition, the fifty-fourth legislative assembly has appropriated an additional 1.0 percent of salaries for each agency budget. Within limits of the 1.0 percent appropriation and other available funds, agency and institution directors may make additional compensation adjustments. The additional adjustments may be granted to resolve problems of pay compression, address salary equity concerns, or in recognition of documented levels of performance that exceed standards. . . .”).

⁷ See Shriver v. Bench, 313 P.2d 475, 477 (Utah 1957).

⁸ See, e.g., N.D.C.C. §§ 54-52-01(12) and 54-52.6-01(7).

classification and compensation system administered by the Human Resource Management Services Division of the Office of Management and Budget.

Effective January 1, 1996, WSI was removed from the state classification and compensation system and was directed to establish an internal personnel system governing position classification, pay administration, and transfer, discipline, and removal of employees.⁹ For the 1997-99 biennium, the Legislature directed that WSI receive its state employee compensation adjustment in a specific lump sum, to provide pay raises based on merit and performance.¹⁰ This practice was continued in the subsequent two biennia.¹¹ During the 2003-05 biennium, compensation adjustments were not provided to all state employees and WSI was not directed in the manner in which any compensation adjustments were to be administered.¹²

For the 2005-07 biennium, state employee compensation adjustments were provided in each agency's general appropriation bill as well as a separate appropriation with specific additional amounts identified for agencies, including WSI, which represented the additional amounts necessary to fully fund the increases.¹³ In this legislation, the Legislature unequivocally expressed its intent that the compensation adjustments were to be "across-the-board" for all eligible permanent state employees¹⁴ beginning each July of the biennium. No provision exempting employees of WSI was contained in this legislation.

Although WSI does have general authority to create and administer its own compensation plan, including a pay for performance system, WSI must take into account any across-the-board compensation adjustments provided to all permanent state employees, unless otherwise specifically excepted. Therefore, it is my opinion that all eligible WSI employees must be provided the general across-the-board increase beginning each July of this biennium, to the extent funds are available. Any additional compensation, if funds are otherwise available, can be provided pursuant to WSI policy and practice.

However, it is my understanding that WSI has operated under the assumption that it was not subject to the provisions governing permanent state employee compensation adjustments. As a result, considerable monies have already been allocated and spent for employee raises, often above and beyond the 4% provided as across-the-board increases. This has apparently affected the ability of WSI to provide additional 4% compensation adjustments beginning in July 2006.

⁹ See 1995 N.D. Sess. Laws ch. 525, §§ 1 and 2.

¹⁰ See 1997 N.D. Sess. Laws ch. 15, § 7.

¹¹ See 1999 N.D. Sess. Laws ch. 37, § 11; 2001 N.D. Sess. Laws ch. 15, § 6.

¹² See generally 2003 N.D. Sess. Laws chs. 36 and 44.

¹³ See 2005 N.D. Sess. Laws ch. 25.

¹⁴ Probationary employees and employees whose documented performance levels do not meet standards are not eligible for the general pay increases. *Id.* at § 1.

Agencies providing salary increases, particularly those above and beyond any general across-the-board adjustments, must carefully budget these increases in a way that does not impair the agency's ability to comply with legislative intent for salary increases the second year of the biennium. An agency further must affirmatively take steps to comply with the Legislature's statement of intent on state employee compensation adjustments for the second year of the biennium, including considering rescinding or reducing past increases above the across-the-board adjustment.

Because WSI did not intend salary increases provided from July 1, 2005, to June 30, 2006, to be subject to an additional 4% to be provided across-the-board and, in fact, it appears WSI may not have had spending authority to do so, it is my opinion that appropriate modifications or off-sets to the actual raises provided may be made to comply with legislative intent. For the July 1, 2005, to June 30, 2006, period, WSI must take steps to ensure that eligible employees were paid, in total salary, amounts equivalent to or greater than those amounts employees would have received had they received the 4% across-the-board increase payable August 2005. Prospectively, from July 2006 forward, WSI must take steps to ensure that all eligible employees receive monthly salary payments equivalent to or greater than the amounts payable July 2005 plus the 4% increase that should have been provided and made payable August 2005 together with an additional 4% of that amount payable August 2006. Employees who were not eligible on July 1, 2005, but are eligible July 1, 2006, must receive monthly salary payments equivalent to or greater than their initial regular salary plus the 4% increase.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the action of public officials until such time as the questions presented are decided by the courts.¹⁵

¹⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).