



**BILL RICHARDSON**  
GOVERNOR

**STATE OF NEW MEXICO**  
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**LOCAL GOVERNMENT DIVISION**  
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**JAMES C. JIMENEZ**  
SECRETARY

**ROBERT M. APODACA**  
DIRECTOR

**M E M O R A N D U M**

DATE: July 2, 2008

TO: New Mexico Local Government Public Bodies

FROM: Robert Apodaca, Director, Local Government Division *RMA*  
Department of Finance and Administration

SUBJECT: PERFORMANCE BONUSES, RETROACTIVE PAY INCREASES  
AND BONUSES IN LIEU OF PAY INCREASES

It has been brought to my attention that some local governments are submitting budgets for review as part of the certification process that include budget for "one time" payroll increases or bonuses. Please be advised that these practices have been deemed unconstitutional by the New Mexico Attorney General on more than one occasion. Attached for your review is a letter addressing the issue.

I am instructing my Budget and Finance Bureau Staff to request a revised budget from local government public bodies that include such increases or bonuses in their initial submittal. The revised budget should exclude these items from the budget, based on the Attorney General Opinions cited in the attached letter.

If you have any questions please call John Gallegos, Frank Rendon or me at (505) 827-8051. If you wish to discuss the legality of the AG Opinion, you may want to contact the Office of the New Mexico Attorney General.

Thank you for your attention to this matter.

cc: Katherine Miller, DFA Cabinet Secretary  
Rick Martinez, DFA Deputy Secretary  
The Honorable Gary King, New Mexico Attorney General  
The Honorable Hector Balderas, New Mexico State Auditor



## Attorney General of New Mexico

**PATRICIA A. MADRID**  
Attorney General

**STUART M. BLUESTONE**  
Chief Deputy Attorney General

**GLENN R. SMITH**  
Deputy Attorney General

June 4, 2004

The Honorable Cisco McSorley  
State Senator  
1200 Pennsylvania N.E.  
Albuquerque, NM 87110

Re: Opinion Request – Performance Bonuses, Retroactive Pay Increases and Bonuses  
in Lieu of Pay Increases

Dear Senator McSorley:

You requested our advice regarding performance bonuses, retroactive pay increases and bonuses in lieu of pay increases for University of New Mexico Hospital (“University Hospital”) employees. In particular, you ask:

1. Is it illegal for University Hospital to negotiate retroactive pay increases for employees represented by District 1199NM?
2. Is it illegal for University Hospital to grant performance bonuses to its employees for work already performed?
3. Is it illegal for University Hospital to grant bonuses in lieu of a pay increase for employees?

As discussed below, the payment of retroactive pay increases and bonuses for services already performed is prohibited by the New Mexico constitution. A bonus in lieu of a pay increase is permissible only if paid prospectively for future services.

The payment of retroactive pay increases and bonuses to public employees implicates two provisions of the New Mexico Constitution. The first, often referred to as the “extra compensation clause,” provides in pertinent part:

No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made....

N.M. Const. art. IV, § 27. The second provision is generally known as the “antidonation

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clause" and provides that, with certain exceptions not relevant here:

Neither the state nor any county, school district or municipality ... shall directly or indirectly ... make any donation to or in aid of any person, association or public or private corporation....

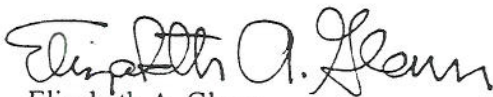
N.M. Const. art. IX, § 14. A "donation" for purposes of the antidonation clause is "a 'gift,' an allocation or appropriation of something of value, without consideration." Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920 (1956).

A retroactive salary increase or performance bonus is, by its nature, additional pay for services already performed by an employee and, as such, a gift of public money. Consequently, this office consistently has concluded that the payment of retroactive salary increases and bonuses to public employees for services already performed is prohibited by the constitution. See, e.g., Att'y Gen. Op. No. 7107 (1971) (Art. IV, § 27 prohibited state agency from giving retroactive pay increases to its employees); No. 62-28 (1962) (retroactive salary increases for Miners' Hospital employees prohibited); No. 57-17 (1957) (legislature had no power to give retroactive pay increases to state employees after their services have already been rendered); No. 4440 (1944) (bonuses for teachers prohibited by Art. IV, § 27 and Art. IX, § 14).

The constitution focuses on retroactive salary increases. See State ex rel. Sedillo v. Sargent, 24 N.M. 333, 336, 171 P. 790 (1918) (Art. IV, § 27 prevents the giving of extra compensation to a public contractor for services already performed under an existing contract). The constitution does not preclude a public employer, such as University Hospital, from considering its employees' past performance when deciding how to compensate them, as long as the employees are paid in return for future services. Thus, University Hospital might, consistent with the constitution, pay its employees a bonus or one-time salary increase if the bonus or increase and the criteria for receiving it were included in the employees' compensation plan or agreement before services were rendered.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



Elizabeth A. Glenn  
Assistant Attorney General