

## CENTRAL WEST VIRGINIA TRANSIT AUTHORITY

The Board of Directors of Central West Virginia Transit Authority met in the Training Room of the Central West Virginia Transit Authority on November 23, 2015 at 5:00 p.m. In addition to several members of the public the following were in attendance:

Bob Kramer	Libby Cawthron	Mark Griffith
Jeff Nelson	Trey Simmerman	Libby Cawthron
Tom Durrett	Nate Currey	
Chris McCarthy	Vanessa Perkins	

Meeting brought to order by President, Robert Kramer, at 5:00 p.m.

First item of business was the approval of the October 19, 2015, Board of Directors meeting minutes. Libby Cawthorn informed the Board that she misspoke at the October meeting when referencing the Saturday Shoppers Express. Cawthorn indicated that the Saturday service has not yet been implemented and requested that any such reference be removed from the October minutes. Motion made by Durrett to approve the minutes with the correction. Second by Nelson. Motion approved unanimously.

Next Agenda item addressed was Public Comments. President opened the floor for comments. Board heard concerns and suggestions from Robert Kirkman and Teresa Lechlitter, regarding recent route changes to the Hartland route.

The Board next addressed the General Manager's Report. General Manager, Vanessa Perkins, updated the board on current improvement/maintenance projects. The report indicated that the bus radios have been installed in all buses. The Manager also reported that the fencing project is complete. Mark Griffith reported that the canopy project is ongoing and anticipates that project should be completed by end of the year weather permitting. General Manger reported that the Division of Highways is willing to offer an extension of six months if canopy and lighting projects cannot be completed by the end of 2015. General Manager also reported that placement of security cameras at the transfer station will be reviewed in the coming weeks. In addition, the Board was informed that CENTRA is currently waiting on Balestra, Harr & Scherrer, CPA's to provide a date for the upcoming audit.

Next item of business addressed was Trial Run Services Analysis. Libby Cawthron reported receiving only positive reviews on recent route changes. Discussion followed regarding overcrowding issues and ridership concerns involving the Hartland route.

Next agenda item addressed was Personnel Evaluations. Board briefly discussed policies for evaluating drivers and office staff. Board also discussed procedures for alerting public

when bus service will be interrupted due to inclement weather. General Manager explained the current procedure followed before services are interrupted.

Board next addressed upcoming levy. Willie Parker, County Administrator, addressed the Board. Mr. Parker explained the levy process followed by the Harrison County Commission. Mr. Parker indicated that a draft of the CENTRA levy is proceeding and stated that it should be presented to the County Commission by the first of the year. Parker indicated any requests of CENTRA regarding the levy would be reviewed by the Commission.

Motion was made by Nelson to go into executive session to discuss personnel matters pursuant to the attorney client privilege. Second by Durrett. Brief discussion followed regarding concerns of Robert Kirkman regarding what would be discussed in executive session. Motion approved by all.

Motion made by McCarthy to come out of executive session. Second by Durrett. Approved by all.


Motion made by Nelson to approve and enter into the minutes Amendment 1 to the contract by and between Central WV Transit Authority and Amalgamated Transit Union, Local 812 . Second by Durrett. Motion approved by all.

Board counsel Frank Simmerman, III, explained that the purpose of Amendment 1 is to clarify that the originally bargained for incentive pay, which was mis-labeled as a bonus, was actually intended to encourage Authority employees to avoid unexcused absences. The Amendment is intended to clarify that this is actually an Attendance Pay based on time worked.


Brief discussion followed regarding recent route changes. Board indicated that it will continue to review concerns and suggestions of the public regarding route changes.

No other business to address a motion to adjourn was made by Durrett, a second by Nelson. Motion carried and meeting adjourned at 6:21 p.m.

Approved:

  
\_\_\_\_\_  
Robert Kramer  
President

Approved:

  
\_\_\_\_\_  
Christopher J. McCarthy  
Secretary-Treasurer



*enter into record w/minutes*

## AMALGAMATED TRANSIT UNION

5025 WISCONSIN AVE., N.W. WASHINGTON, D.C. 20016-4139  
(202) 537-1645 FAX (202) 244-7824

November 9, 2015

*By Electronic and First-Class Mail*

Trey Simmerman  
Simmerman Law Office, PLLC  
254 E. Main Street  
Clarksburg, WV 26301  
[trey@simmerman.com](mailto:trey@simmerman.com)

Re: CENTRA Attendance Bonus

Dear Mr. Simmerman:

I am writing as counsel for Amalgamated Transit Union Local 812 for the limited purpose of its dispute with the Central West Virginia Transit Authority (CENTRA) regarding the attendance bonus provision of the current collective bargaining agreement between the parties. In particular I write to communicate the local union's position that the bonus does not violate the West Virginia Constitution, and that its elimination would be an unwarranted and legally unsupported breach of the collective bargaining agreement.

As I understand the issue, CENTRA has concerns regarding the attendance bonus as a result of the Audit Report of Central West Virginia Transit Authority for the Fiscal Year ended June 30, 2014, which was prepared by the West Virginia State Auditor. In that report, the State Auditor observed that CENTRA had "expenditures totaling \$17,062.51 for Christmas bonuses for employees," and suggested that such expenditures violated Article VI, Section 38 of the West Virginia Constitution. Section 38 provides that "[n]o extra compensation shall be granted or allowed to any public . . . servant . . . , after the services shall have been rendered . . ."

The local union appreciates CENTRA's desire to take seriously the recommendation of the State Auditor. However, to the extent that the expenditures to which the State Auditor referred were the attendance bonuses paid pursuant to the parties' collective bargaining agreement, the recommendation is not supported by existing legal precedent.

First, the Supreme Court of Appeals has held that Section 38 applies to only those employees whose compensation is set by statute. That is to say that Section 38 does not apply to employees such as those at CENTRA whose compensation is not set by statute, but instead is set through the collective bargaining process. As stated by the Court, the ban on "extra compensation" in

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Section 38 “applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the Constitution of the State or by statute made in pursuance thereof.” *Rucker v. Bd. Of Supervisors of Pocahontas Cnty.*, 7 W. Va. 661, 663 (1874).

Second, even if Section 38 were applicable to CENTRA’s employees, it would not prohibit CENTRA from making the attendance bonus payments in question. In *State ex rel. Board of Governors of West Virginia University v. Sims*, 133 W.Va. 239, 244, 55 S.E. 2d 505, 508 (1949), the Supreme Court of Appeals held that Section 38 does not prohibit payments which are made “for a public purpose as distinguished from a personal gratuity.” For that reason, although payments made pursuant to a pension plan are “extra compensation” granted “after the services shall have been rendered,” such pension payments do not violate of Section 38. As fully explained by the Supreme Court of Appeals in *Campbell v. Kelly*, 157 W.Va. 453, 473, 202 S.E.2d 369, 381 (1974):

[T]here is a public purpose [to pensions programs] which over-rides any ancillary private gain to an individual and, therefore, the public purpose removes pension programs from the proscription of Article VI, Section 38, as such pension programs are designed primarily to attract to government service able and competent people who will remain in the active employee of the government for an extended period. As the development of competence through experience is a legitimate State objective, pension are not proscribed by constitutional provisions similar to Article VI, Section 38.

Based on that principles enunciated by the Supreme Court of Appeals, Attorney General Patrick Morrissey correctly held in an October 1, 2013, opinion letter that employee performance incentives are not prohibited by Article VI, Section 38. As Attorney General Morrissey noted: “. . . Section 38 is inapplicable here because the employee’s contract contained a previously-bargained-for performance incentive, not a pure gratuity.” I am enclosing with this letter a copy of the opinion letter for your convenience.

For all of the above reasons, the attendance bonuses paid to members of Local 812 are not prohibited by Article VI, Section 38 of the Constitution of West Virginia. The attendance bonus is a previously-bargained-for performance incentive which serves the legitimate operational objectives of CENTRA and is not a personal gratuity which is being paid to employees for services already rendered. It must be noted that the State Auditor misunderstood the attendance bonuses to be “Christmas bonuses,” and that this misunderstanding may be the source of the confusion over the permissibility of the payments.

Lastly please keep in mind that forms of compensation such as attendance bonuses are matters which are traditionally considered appropriate for collective bargaining. Limiting the scope of

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bargaining by refusing to bargain over such bonuses would not only be unwarranted by the Constitution of West Virginia and existing legal precedent, it would also be a failure to honor the terms of its 13(c) agreement with Local 812 which requires CENTRA to preserve and continue the collective bargaining rights of its employees as a condition of remaining eligible for federal transit grants.

Please do not hesitate to contact me with any questions or concerns at [dsmith@atu.org](mailto:dsmith@atu.org) or (301) 431-7100.

Very truly yours,



Daniel B. Smith  
Assistant General Counsel

Enclosure

c: Paul Bowen, International Vice President, ATU  
Nathan B. Currey, President/Business Agent, ATU Local 812

2013 WL 5508581 (W.Va.A.G.)

Office of the Attorney General

State of West Virginia

October 1, 2013

\*1 The Honorable Glen B. Gainer III  
State Auditor  
State Capitol Complex, Bldg. 1, Rm. W-100  
Charleston, WV 25305

Dear Auditor Gainer,

You have asked for an Opinion of the Attorney General about whether state law allows a particular state governmental employer to pay an employee performance incentives and settlement remittances. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that “the attorney general shall give written opinions and advice upon questions of law ... whenever required to do so, in writing, by ... the auditor[.]” To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Attorney General’s Office.

Your letters raise two legal questions, each addressed in turn below:

*(1) May the state governmental employer include performance incentives in its employee’s contract? (2) May the employer make payments to its former employee under a litigation settlement entered into at a later time?*

#### **Background**

Your request centers on the propriety of two contracts between a particular state governmental employer and one of its former employees. The first contract is an agreement in which the employer hired the employee. Under this employment agreement, the state entity agreed to pay the employee a base salary for a set number of years, plus additional performance-based incentives. These incentives provide that the employer would pay the employee additional sums either if the employee completed certain specified tasks or if persons within the employee’s

State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, WV 25305 area of responsibility achieved certain metrics of success. The employment agreement stated that if the employer terminated the employee for cause, the employee would not be entitled to any compensation beyond what the employee had already earned. But if the employer terminated the employee without cause, the employee would be entitled to the base salary for the full remaining time under the contract. The employment agreement purports to be confidential.

The second contract arose after the employment agreement. In this contract, the employee agreed to resign his employment and to release all claims the employee might have against the employer. In exchange, the employer agreed to pay the employee the base salary under the remainder of the contract term plus an additional amount. This settlement agreement also purports to be confidential.

In two recent letters, you wrote to the Office of Attorney General, following up on a series of unanswered Opinion requests from the past decade. The first letter attached a number of earlier requests that had asked whether various state governmental entities—from municipalities to counties to state agencies—may offer performance-based payments to public employees. Your most recent letter to us further requested an Opinion on several specific issues involved in this employee’s contracts and asked several specific legal questions, including whether you must honor the confidentiality clauses in the two agreements.

\*2 We answer your legal questions below with the exception of your concerns regarding confidentiality. Although the general rule is that litigation settlement agreements involving a public body must be disclosed under the West Virginia Freedom of Information Act, *see* Syl. pt. 2, *Daily Gazette Co., Inc. v. Withrow*, 177 W. Va. 110, 350 S.E.2d 738 (1996), we

lack sufficient facts to apply that rule to the specific contracts at issue. Without more information, we cannot determine whether an exception to the Act applies or other reasons exist that may bear on the issues of confidentiality. Accordingly, we have chosen in this letter not to disclose any specifics of the contracts or other information, including certain legal citations, that might identify the particular employer or employee.

***Question One: May the state governmental employer include performance incentives in its employee's contract?***

In your requests for an Opinion, you asked whether any state law prohibits performance incentives of the type in the employee's employment agreement. You focused specifically on Article VI, Section 38 of the West Virginia Constitution ("Section 38") and West Virginia Code § 12-3-13. Under Section 38, "[n]o extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, *after* the services shall have been rendered or the contract made ... [n]or shall the salary of any public officer be increased or diminished during his term of office." W. Va. Const. art. VI, § 38 (emphasis added). Separately, West Virginia Code § 12-3-13 provides that compensation may not be paid *before* services are rendered: "No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." W. Va. Code § 12-3-13.

**Article VI, Section 38 of the West Virginia Constitution**

For two independent reasons, the constitutional restriction does not bar the employment agreement in question. *First*, Section 38 is inapplicable here because the employee's contract contained a previously-bargained-for performance incentive, not a pure gratuity. A gratuity is an after-the-fact tip for good service. Gratuities often take the form of non-contract lump-sum payments to employees *after* the employees already rendered their services for predetermined salaries. 61 W. Va. Op. Att'y Gen. 29 (1985). Such payments run afoul of Section 38 because they increase an employee's compensation for a set amount of work after the terms of employment have been agreed upon and the work has been done.

Section 38 does not prohibit bargained-for increases in compensation that occur prior to the start of the work. For example, the legislature may increase compensation for judges, but may only do so at the start of new terms of office. *Harbert v. Harrison Cnty. Court*, 129 W. Va. 54, 71, 39 S.E.2d 177, 189 (1946). Similarly, this Office has determined that annual salary adjustments based on years of service do not constitute impermissible bonuses for purposes of Section 38. *See* 63 W. Va. Op. Att'y Gen. 37 (1990).

\*3 Nor does Section 38 forbid the State from granting contemporaneous salary increases to employees who are newly expected to perform additional services. *State ex re I. Cooke v. Jarre II*, 154 W. Va. 542, 547, 177 S.E.2d 214, 217 (1970); 55 W. Va. Op. Att'y Gen. 168 (1973) (same); 61 W. Va. Op. Att'y Gen. 13 (1985) (same); 56 W. Va. Op. Att'y Gen. 198 (1975) (same). Extra compensation may generally be given whenever a position is modified such that new duties make the job "embrace a new field ... beyond the scope or the range of the office as it formerly existed or functioned." *Springer v. Board of Education*, 117 W. Va. 413, 413, 185 S.E. 692, 694 (1936); *State ex rel. Goodwin v. Rogers*, 158 W. Va. 1041, 1055, 217 S.E.2d 65, 73 (1975) (same). The duties must not be purely incidental, however. Thus, the West Virginia Supreme Court of Appeals has held that Section 38 barred the State from granting a pay raise when the employee's duties were expanded only by an incidental requirement to attend a new in-service training program. *Delardas v. Cnty. Court of Monongalia Cnty.*, 155 W. Va. 776, 789, 186 S.E.2d 847, 856(1972).

In light of these principles, this Office has previously opined that it is consistent with Section 38 for the State to include prospective performance incentives in employment contracts. Specifically, this Office previously determined that teachers cannot be paid a cash bonus for unused leave, where such a bonus was not a pre-negotiated part of the teachers' contracts prior to the start of employment for the school year. 59 W. Va. Op. Att'y Gen. 86 (1981). The Opinion found the pay-out objectionable because it "would be paid after the employee had performed the very services he had contracted to perform, and it would be paid solely for 'coming to work.'" *Id.* However, Section 38 would not preclude a contract that included an option for additional compensation if the employee met certain conditions, such as not taking any leave. *Id.* This Office suggested that "the potential constitutional objections may be curable at least as to prospective school years by inserting appropriate language into the standard employment contracts so that the incentive plan becomes, in effect, part of the contract before the services are rendered." *Id.*

That earlier Opinion comports with the plain text of Section 38. Significantly, Section 38 provides that "[n]o extra

compensation shall be granted or allowed ... after the services shall be rendered *or the contract made.*" W. Va. Const. art. VI, § 38 (emphasis added). The highlighted phrase supports the notion that the provision is directed at *non-contract* payments and does not prohibit performance incentives included in a contract.

The Opinion is also consistent with the decision of the highest court in at least one other state that has a similar constitutional provision. Article III, § 19 of the Nebraska Constitution— like Section 38—provides that "[t]he Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered." The Supreme Court of Nebraska has interpreted this provision to allow bargained-for payments, even if contingent on unknown events. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 83, 752 N.W.2d 137, 147 (2008). "[W]hen the 'services' for which compensation is paid are rendered after the date on which the terms of compensation are established, the benefits awarded are not a gratuity." *Id.* The Court accordingly held that an agreement to pay severance, in the event of termination, did not constitute an impermissible gratuity because it induced employees to perform future services. *Id.* at 84, 752 N.W.2d at 148; *see also* Fla. Op. Att'y Gen. 2007-26 (stating with regard to a Florida law similar to Section 38 that "[e]xtra compensation generally refers to an additional payment for services performed or compensation over and above that *fixed by contract* or law *when the services are rendered*" (emphasis added)).

\*4 In accord with this Office's previous Opinion, we conclude that the performance incentives at issue here are allowable under Section 38. The employment agreement between the state employer and the employee established at the outset of a term of employment that the employee would be paid additional amounts based on future performance that went above and beyond the employee's regular duties. Those payments constitute previously-bargained-for performance incentives, not after-the-fact gratuities, and therefore are not objectionable for purposes of Section 38.

*Second*, Section 38 also does not apply to the employee's contract because the compensation was not set by statute or fixed by some other law. Our Supreme Court of Appeals has held that the constitutional ban on extra compensation "applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the Constitution of the State or by statute made in pursuance thereof." *Rucker v. Bd. of Supervisors of Pocahontas Cnty.*, 7 W. Va. 661, 663 (1874) (interpreting a predecessor provision with the same language); *id.* at 661 n.1 (setting forth language of provision). Where a governmental entity is allowed by statute some measure of discretion to set the employee's compensation, the constitutional ban does not apply. *Id.* at 663-64 (holding that the restriction does not apply to a prosecutor's salary where a state statute gives a county board discretion over the range of fees going toward the prosecutor's compensation). While state courts have not revisited *Rucker* in recent times, or specifically applied its holding in modern state employment contexts, the case remains good law today.

In this case, the employee's salary was not set by Constitution or statute and, therefore, Section 38 does not apply. Like many other state entities, the state employer in question is exempt from the Division of Personnel's rules, has the statutory authority to promulgate its own personnel rules, and is empowered to enter into personal contracts. Under the employer's own rules, it had complete discretion to set the compensation of the particular employee at issue by contract, as the employee was not subject to any sort of salary schedule. That discretion and the authority to enter into contracts put the contracted-for performance-based incentives at issue here beyond the reach of Section 38.

#### West Virginia Code § 12-3-13

We also conclude that West Virginia Code § 12-3-13 does not forbid the employment agreement at issue. That provision mandates that "[n]o money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." W. Va. Code § 12-3-13. This means that a contract must make all payment contingent on actual performance of some stated services. A signing bonus, or other amount to be paid before an employee began and performed some work, would be unlawful. The arrangement here is consistent with the statutory restriction because the employer agreed to pay an incentive after the employee undertook a specific act or achieved a certain goal.

**Question Two: May the employer make payments to its former employee under a litigation settlement entered into at a later time?**

\*5 You also requested that this Office opine on the legality of a second contract that arose after the employment agreement. Based on the materials you have provided, this second contract resembles a litigation settlement. Under this agreement, the



employer and the employee have agreed to release their legal claims against one another in exchange for consideration. The employer has agreed to pay the employee a certain sum, and the employee has agreed to resign and forgo any claims the employee might have had against the institution. The payments that the institution must make under the settlement agreement appear to match the employee's salary under the employment agreement, but there is no pay-out of any unearned performance incentives.

Based on what you have told us, the settlement agreement does not appear to contravene West Virginia law. The employer is expressly provided by statute the power to conduct its financial and business affairs, which would seem to include the authority to settle active and potential legal claims against it. Assuming that the settlement agreement is not invalid for other reasons, the agreement binds the employer to make payments in the future years as scheduled under the contract. Without additional facts, we do not address broader issues about the employer's power to obligate the State to make payments under future appropriations, but should you have further questions, please do not hesitate to contact this Office.

Sincerely,

Patrick Morrisey  
Attorney General  
Elbert Lin  
Solicitor General  
Christopher S. Dodrill  
Assistant Attorney General

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2013 WL 5508581 (W.Va.A.G.)

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AMENDMENT 1 TO CONTRACT BY AND BETWEEN CENTRAL WV TRANSIT  
AUTHORITY AND AMALGAMATED TRANSIT UNION, LOCAL 812, CONTRACT  
DATES JULY 1, 2013 TO JUNE 30, 2016


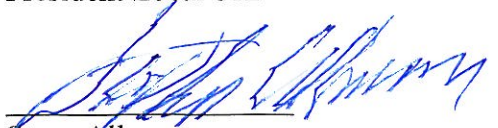


DATED 11/23/15

SECTION VI. ATTENDANCE

[All other provisions under Section VI remain in effect and unchanged]

5. ~~BONUS.~~ ATTENDANCE PAY

- (a) This attendance pay was originally bargained for as an incentive to encourage Authority employees to not “miss-out”, as such term is defined in the contract.
- (b) The regular, and timely, arrival/departure of Authority employees is a core business principle of the Authority, of value to the Authority and the public at large.
- (c) This attendance pay, previously mis-labeled as a bonus, was originally agreed-upon compensation by and between the Authority and Local 812 within the Contract by and between Central WV Transit Authority and Amalgamated Transit Union – Local 812, effective July 1, 2013 to June 30, 2016.
- (d) The Authority ~~further~~ agrees [that] each December 15<sup>th</sup>, the Authority will pay to each full-time employee who has not accumulated a combination of four (4) miss-outs or unexcused absences per year, and who has worked at least 1,040 hours in that year, an attendance pay of ~~a bonus of~~ \$500.00.
- (e) Those full-time employees who obtained less than 1,040 hours will have their attendance pay ~~bonus~~ pro-rated accordingly.
- (f) Nothing contained herein shall be utilized or construed to guarantee an Attendance Pay clause in future contracts by and between the Authority and Local 812.

<p>FOR THE UNION:</p> <p> Nathan B. Currey President Local 812</p> <p> Steve Allman Vice-President Local 812</p>	<p>FOR CENTRA:</p> <p> Vanessa Perkins General Manager</p> <p> Robert Kramer President of CENTRA</p>
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