



**Montana Legislative Services Division**  
**Legal Services Office**

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To: Legislative Finance Committee

From: Julie Johnson

Re: State Employee Salaries and Collective Bargaining -- Legislative Considerations

Date: March 6, 2014

The purpose of this memo is to update and expand on a 1986 memo by Greg Petesch regarding the Legislature's role and authority with regard to State employee compensation and collective bargaining, as well as other legislative considerations regarding State employee pay.

Montana has a dual system of employment for its State employees. While all State employees are covered by the statutes on employee classification, compensation, and benefits found in Title 2, chapter 18, of the Montana Code Annotated, many employees are further covered by collective bargaining agreements. Both systems are discussed in this memo.

## **I. EMPLOYEE CLASSIFICATION AND COMPENSATION**

Laws related to State employee classification, compensation, and benefits are found in Title 2, chapter 18, of the Montana Code Annotated (MCA). Section 2-18-102, MCA, delegates the administration of state employee personnel to the Department of Administration (Department) "[e]xcept as otherwise provided by law or collective bargaining agreement." This section also allows the Department to delegate its authority to other State agencies in certain circumstances.

Section 2-18-201, MCA, authorizes the Department to "implement and maintain a broadband classification plan for all state positions in state service" except for those positions that are specifically exempted by statute.<sup>1</sup> Section 2-18-204, MCA, more specifically provides:

- (1) The department shall determine the occupations for positions of employees in each agency. At any time, upon request of an agency, the department may amend the list of occupations for the requesting agency.
- (2) Based on documentation to be submitted by each agency, the budget director shall determine the number of positions and employees (full-time equivalents) of each agency or program prior to preparation of the executive budget and before the beginning of each fiscal year. At any time, upon the request of the agency, the budget director may amend the number of positions or employees (full-time equivalents) in any agency or program.

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<sup>1</sup> Among the several positions that are exempt are elected officials, legislative employees, and personal staff. §§ 2-18-103 and -104, MCA.

(3) This section does not limit legislative authority to amend the determinations of the department or the budget director.

Section 17-7-111(3)(d), MCA, requires an agency budget request to set forth a balanced financial plan for each fiscal year of the ensuing biennium and to include "actual FTE and disbursements for the completed fiscal year of the current biennium, estimated FTE and disbursements for the current fiscal year, and the agency's request for the ensuing biennium, by program."

Similarly, § 17-7-123, MCA, requires the executive budget to include "budget and full-time equivalent personnel position comparisons by agency, program, and appropriated funds for the current and subsequent biennium" as well as "a statement containing recommendations of the governor for the ensuing biennium . . . including . . . matters not included as a part of the budget bill but included as a part of the executive budget, such as the state employee pay plan".

Legislative action on the governor's proposed budget is governed by § 17-7-131, MCA (emphasis added):

(1) The presiding officers of the house of representatives and of the senate shall promptly refer the budgets and budget bills to the proper committees. The budget bill for the maintenance of the agencies of state government and the state institutions must be based upon the budget and proposed budget bill submitted at the request of the governor. The legislature may amend the proposed budget bill, but it may not amend the proposed budget bill so as to affect either the obligations of the state or the payment of any salaries required to be paid by the constitution and laws of the state.

(2) The adopted budget must be limited so that a positive ending general fund balance exists at the end of the biennium for which funds are appropriated.

As discussed in more detail below, the underlined language above allows the Legislature to alter compensation for nonunion personnel services rendered prospectively, but it cannot alter compensation for services already performed or compensation agreed upon in a ratified collective bargaining agreement.

Compensation for State employees who are members of a union is a term negotiated in their respective collective bargaining agreements. Compensation for state employees who are not union members is governed by statute. Current law provides that their compensation is to "be based on an analysis and comparison of the municipal and state government labor markets in North Dakota, South Dakota, Idaho, and Wyoming as provided by the department from the national compensation association of state governments salary survey and other information relative to the state government salaries and compensation in those states." § 2-18-301, MCA. The "other information" includes an analysis of the labor market as determined by the department in a biennial salary survey.

In order to perform the required analyses and comparisons, the Department is required to conduct and submit the following to the Office of Budget and Program Planning (OBPP):

1. An analysis of how Montana government employee salaries and other compensation compare to the municipal and state government salaries in North Dakota, South Dakota, Idaho, and Wyoming; and
2. An analysis of the labor market as determined by the department in a biennial salary survey.

§ 2-18-301, MCA. The Department must consider "competency, internal equity, and competitiveness to the municipal and state government labor markets in North Dakota, South Dakota, Idaho, and Wyoming" in its administration of the pay plan. Id. Section 2-18-301, MCA, would benefit from clarifying legislation because the statute requires the Department to conduct two salary surveys. However, it then suggests that the Department consider only one of the analyses. If the Department is conducting two surveys, the statute should allow both to be considered.

Currently, the Broadband Pay Plan consist of nine pay bands. Based on the biennial salary survey, the Department:

1. Identifies current market rates for all occupations
2. Establishes salary ranges for each pay band
3. Recommends competitive pay zones with the municipal and state government labor markets in North Dakota, South Dakota, Idaho, and Wyoming.

§ 2-18-301, MCA. The Legislature has expressly acknowledged that "[t]he intent [of the Broadband Pay Plan] is to bring all pay bands to the same relationship percentage of the market rate midpoint salary comparison when fiscally able." § 2-18-301, MCA.

Section 2-18-303, MCA, which sets forth the procedures for administering Broadband Pay Plan, is typically amended each session to address compensation for the following biennium for both union and nonunion employees. Currently, the first four subsections provide:

(1) On the first day of the first complete pay period in fiscal year 2014, each employee is entitled to the amount of the employee's base salary as it was on June 30, 2013.

(2) An employee's base salary may be no less than the minimum salary of the pay band to which the employee's position is allocated.

(3) Funds appropriated under section 4, Chapter 385, Laws of 2013, must be used to increase the base pay for each employee. The base pay of employees must be increased as determined by the executive branch, including those subject to the provisions of Title 39, chapter 31, with particular attention to the lower pay bands and those who did not receive a base pay increase during the biennium

beginning July 1, 2011.

(4) (a) (i) A member of a bargaining unit may not receive the pay adjustment provided for in subsection (3) until the employer's collective bargaining representative receives written notice that the employee's collective bargaining unit has ratified a collective bargaining agreement.

(ii) If ratification of a collective bargaining agreement, as required by subsection (4)(a)(i), is not completed by the date on which a legislatively authorized pay increase is implemented, members of the bargaining unit must continue to receive the compensation that they were receiving until an agreement is ratified.

(b) Methods of administration consistent with the purpose of this part and necessary to properly implement the pay adjustments provided for in this section may be provided for in collective bargaining agreements.

## **II. COLLECTIVE BARGAINING**

### **A. Roles of Executive and Legislative Branches**

Laws related to collective bargaining for public employees are located in Title 39, chapter 31, MCA. "[I]t is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." § 39-31-101, MCA. The bulk of the statutes related to collective bargaining were enacted in 1973, shortly after the Constitutional Convention of 1972. In fact, there was considerable discussion by the delegates to the Constitutional Convention about whether the right to collective bargaining for public employees should be enumerated in the Constitution. Ultimately, the delegates concluded that the right to organize could properly be addressed in statute, and laws authorizing collective bargaining for public employees were passed the following session.

Collective bargaining agreements are contractual obligations for the State. Under the public employee collective bargaining laws, the Governor represents the State as the public employer in collective bargaining with an exclusive representative of a group of employees. § 39-31-301, MCA. The exclusive representative is defined as "the labor organization which has been designated by the board [of personnel appeals] as the exclusive representative of employees in an appropriate unit or has been so recognized by the public employer". § 39-31-103(4), MCA.

The Governor has both the "authority and the duty" to negotiate with the exclusive representative in good faith "with respect to wages, hours, fringe benefits, and other conditions of employment". § 39-31-305, MCA. However, the obligation to negotiate in good faith "does not compel either party to agree to a proposal or require the making of a concession". Id.

Section 39-31-305, MCA, also defines the Legislature's role in the collective bargaining process:

(3) For purposes of state government only, the requirement of negotiating in good

faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith (emphasis added).

The Legislature is the final arbiter of the agreement negotiated by the Governor and the union by choosing whether or not to appropriate funds sufficient to fund the agreement. Section 2-18-301(3), MCA, expressly states: "Total funds required to implement the pay increases, if any, provided for in 2-18-303 for any employee group or bargaining unit may not be increased through collective bargaining over the amount appropriated by the legislature." Also, pay adjustments for administering broadband pay plan (for nonunion state employees) "supersede any other plan or systems established through collective bargaining after the adjournment of the legislature". No provision is made for what occurs if the bargaining parties enter into a negotiated agreement that the Legislature does not fund.<sup>2</sup> And while the Legislature sets the upper limits of funding, it is up to the Governor to distribute the funds among State employees covered by the Broadband Pay Plan and collective bargaining agreements.

There are some restrictions, though, as to when a Governor can distribute funds for pay increases authorized by the Legislature. For example, a member of a union that has not ratified a collective bargaining agreement may not receive a pay adjustment until the Governor receives a written notice that the union has ratified it. § 2-18-303(4)(a)(i), MCA.<sup>3</sup> However, as mentioned previously, once the agreement is ratified, it is an enforceable contract protected from impairment under the Montana and U.S. Constitutions.<sup>4</sup>

Similar to the laws on public employee classification and compensation, the statutes on public employee collective bargaining do "not limit the authority of the legislature . . . relative to appropriations for salary and wages, hours, fringe benefits, and other conditions of employment." §39-31-102, MCA. Therefore, although the laws on collective bargaining for State employees

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<sup>2</sup> Typically, however, negotiated agreements explicitly provide that the agreement is contingent on legislative funding and approval.

<sup>3</sup> If ratification of a collective bargaining agreement is not completed by the date on which a legislatively authorized pay increase is implemented, members of a particular union continue to receive the compensation that they were receiving until an agreement is ratified. § 2-18-303, MCA.

<sup>4</sup> Art. II, sec. 31, of the Montana Constitution and Art. I sec. 10, clause 1, of the U.S. Constitution prohibit laws impairing the obligations of contracts. The United States Supreme Court in *U.S. Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), has held that a contract impairment will be held unconstitutional if: (1) the impairment is a substantial impairment; and (2) the government enacting impairing legislation does not first at least seriously consider nonimpairing or lesser impairing legislation.

recognize the Legislature's authority over the appropriation of funds, it also removes the Legislature from the bargaining process itself.

## **B. Duty to Negotiate in Good Faith**

The Legislature's role with regard to approving a collective bargaining agreement submitted by the Governor was recently discussed in MEA-MFT v. State, 1st Judicial Dist., Cause No. BDV-2012-554 (Order of May 13, 2013), with Judge Jeffrey Sherlock presiding. In that case, three labor unions filed a charge of unfair labor practice<sup>5</sup> against the State based on the 2011 Legislature not approving House Bill No. 13, which would have funded the collecting bargaining agreements negotiated between the unions and the Governor for the 2013 biennium.

The negotiated agreements submitted by the Governor explicitly provided that the "proposal[s] were] contingent on legislative funding and approval". The unions claimed that the Legislature had delayed the handling of the bill during the 2011 session, which resulted in it not being approved and keeping state employees' wages frozen for 2 more years. The unions argued that the State, through its Legislature, failed to negotiate the bill in "good faith" by delaying the discussion of the bill and not passing it even though there was a projected ending fund balance of \$170 million.

The State argued that the Governor's office had negotiated with the unions in good faith in reaching the negotiated agreements and therefore the State had fulfilled its duties and obligations when it submitted the agreements in House Bill No. 13 (2011).

Ultimately, the District Court affirmed the hearing officer's dismissal of the unions' complaint, citing the explicit language of § 39-31-305, MCA, that "the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution". The District Court concluded that "[t]he fact that the bill was introduced for review is enough, even if legislators had no intention whatsoever to pass the bill". Order at 8. The District Court also concluded that "only the executive branch is held to the

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<sup>5</sup> Section 39-31-401, MCA, provides that it is an unfair labor practice for a public employer to:

(1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;  
(2) dominate, interfere, or assist in the formation or administration of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.

(3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization. However, nothing in this chapter or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a union member must have an amount equal to the union initiation fee and monthly dues deducted from the employee's wages in the same manner as checkoff of union dues.

(4) discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; or

(5) refuse to bargain collectively in good faith with an exclusive representative.

good faith standard under Montana Code Annotated §§ 39-31-102 and -305(3)". Finally, Judge Sherlock concluded:

It is not the purview of the Board [of Personnel Appeals] or the courts to determine how much debate a bill should be afforded, when a bill must be acted on, or whether a bill should be passed or approved. The Court is bound to respect the power of the legislature expressly delegated to it by the constitution and the statutes . . . . Otherwise, we would create a quagmire from which there is no escape.

The unions did not appeal the decision to the Montana Supreme Court.

### **III. Legislative Action on Public Employee Compensation**

As stated above, the Legislature has authority to amend statutes regarding compensation as long as the amendments do not impair "either the obligations of the state or the payment of any salaries required to be paid by the constitution and laws of the state." §17-7-131, MCA. Along these lines, the Montana Supreme Court has stated that statutes fixing certain terms and conditions of public employment, such as salaries and compensation, do not create contractual rights and that such statutes are "intended merely to declare a policy to be pursued until the Legislature declares otherwise." Wage Appeal of Montana St. Highway Patrol Officers v. Board of Personnel Appeals, 208 Mont. 33, 41, 676 P.2d 194, 199 (1984). In Wage Appeal, the Legislature had passed a bill that repealed a 1% longevity increment for state highway patrol officers. The highway officers challenged the repeal on the basis that it impaired their employment contracts entered into prior to the repeal of the statute. Id.

The Supreme Court disagreed that the statute on longevity constituted a contractual right and further concluded that in order for a statute to create contractual rights "the language of the statute and the circumstances must manifest a legislative intent to create private rights of a contractual nature enforceable against the State". Id. Statutes are presumed to not create a contractual right. The burden to prove that a statute created a contractual right rests with the one claiming a contractual right exists.

In Sheehy v. Public Employees Retirement Div., 262 Mont. 129, 864 P.2d 762 (1993), State retirees challenged the repeal of statutes that provided for a complete State tax exemption of a State retiree's pension benefits. The retirees claimed that the statutes exempting their benefits from taxation did manifest a clear legislative intent to create a contractual right. The retirees did not support their contention with any analysis, however, and thus did not meet their burden to overcome the presumption. Furthermore, the Supreme Court focused on the use of the present tense in the statute to determine that the statute did not contain a manifestation of legislative intent.

The Sheehy court reiterated the holding in Wage Appeal:

When the Legislature enacts a statute fixing certain terms and conditions of public employment, such as salaries and compensation, it is presumed that the statute does not create contractual rights, but is intended merely to declare a policy to be pursued until the Legislature declares otherwise.

Sheehy, 262 Mont. 129, 134, 864 P.2d 762, 765, citing Wage Appeal, 208 Mont. 33, 41, 676 P.2d 194, 199. Thus, it appears the Legislature can alter salaries prospectively, prior to the vesting of a salary right.<sup>6</sup> The right is vested at the point that the service for which the salary is paid was performed prior to the legislative change. Performance of service at the time a statute is in effect constitutes a contractual obligation on the part of the State.

#### IV. CONCLUSION

The Legislature's role with regard to State employee compensation is hinged on its power to appropriate and to enact legislation as long as it does not impair an employee's vested contractual right. It may not attach conditions to the appropriation that infringe on powers properly reserved to another branch of government. Its role in the collective bargaining process is at the same time limited, given that it does not participate directly in negotiations, and far-reaching, with it serving as the final arbiter of any negotiated agreement.

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<sup>6</sup> Neither Wage Appeal nor Sheehy discuss a reduction of an employee's base salary. Compensation for judges' salaries may not be diminished during the their term of office. Art. VII, sec. 7, Mont. Const. A Legislature cannot set its own compensation. Art. V, sec. 5, Mont. Const.