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OFFICE OF THE
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STATE CAPITOL
Phoenix, Arizona 85007
May 11, 1977

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Honorable John J. Hutton
Arizona State Senator
State Capitol
Phoenix, Arizona 85007

Re: 77-108 (R77-115)

Dear Senator Hutton:

This is in response to your letter dated March 31, 1977, wherein you posed substantially the following questions:

1. If the Legislature does not act under A.R.S. § 38-611 A to set the salaries of "exempt" positions, can the appointing authority establish any salary within funds available?
2. Can the Legislature establish salaries of exempt positions by line item within the general appropriations bill?
3. If the Legislature statutorily establishes the salary, should it be by session law or in statute?
4. What effect does Article 4, part 2, Section 17 of the Arizona Constitution have on the salaries of appointive public officers?
5. Does an increase in salary for cost-of-living, merit, reclassification of a position or a regrading of a position constitute an increase in compensation?
6. If a separate bill setting out salaries for "exempt" positions is passed, is it subject to a governor's veto by line item, as is the general appropriations bill?

In order to answer the first two questions, we will first discuss the relationship of the Personnel Board and the Personnel Administration Division to "exempt" positions.

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The Arizona Legislature has made a large number of State officer and employee positions exempt from those provisions of the Arizona Revised Statutes pertaining to the Personnel Board and the Personnel Administration Division of the Department of Administration.

A.R.S. § 41-771 specifically provides that the articles dealing with the State Personnel Board^{1/} and the Personnel Administration Division^{2/} "do not apply to" twelve disparate categories of state officers and employees.

Among the effects of such exemption are that the Personnel Board's rules on position classification (i.e., salary range)^{3/} have no applicability to exempt positions. This conclusion is supported by A.R.S. § 41-763(5) which requires that the head of the Personnel Administration Division "shall . . . , subject to approval of the personnel board, make an annual recommendation to the legislature and the joint legislative budget committee of a salary plan and adjustments thereto for employees in the state service and an advisory recommendation regarding the compensation for positions otherwise exempt" from the State Personnel System.

The apparent purpose of the advisory recommendation is to assist the Legislature in exercising its authority under A.R.S. § 38-611A, which states:

Except as otherwise provided in subsections C and D, any officer or employee of the state, or any of its agencies, who is exempt from the provisions of the state personnel system shall receive compensation which is determined by legislation which sets forth the compensation of all such officers or employees.^{4/}

^{1/} Title 41, Chap. 4, Art. 6

^{2/} Title 41, Chap. 4, Art. 5

^{3/} Authorized by A.R.S. § 41-783(1), the Rules are A.C.R.R. 2-5-41 and 2-5-42.

^{4/} Subsections C and D of 38-611 exclude elected state officers, employees of the state universities and community colleges, and members of boards and commissions from this provision.

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Thus, the Legislature retains the authority to establish and adjust salaries for "exempt" positions other than those listed in subsections C and D of § 38-611. "Legislation," as used in § 38-611A, does not include the enactment of a general appropriation bill. On at least two occasions, the Arizona Supreme Court has specifically indicated that the general appropriation bill does not come within the true meaning of the term "legislation". First, in Sellers v. Frohmiller, 42 Ariz. 239 (1933), the court held that "the general appropriation bill is not in the true sense of the term legislation; it is, as the language implies, merely a setting apart of the funds necessary for the use and maintenance of the departments of the state government" 42 Ariz. at 246.

Second, in Carr V. Frohmiller, 47 Ariz. 430 (1936), the court relied on its earlier ruling in Sellers and held that "the general appropriation bill is not 'legislation' in the strict sense. Its object is to provide funds to meet previously authorized expenses of the government's different departments, offices, agencies and institutions." 47 Ariz. at 441. Accordingly, we believe that the term "legislation", as used in A.R.S. § 38-611A, contemplates a comprehensive statute analogous to a salary plan, setting forth "the compensation of all such [exempted] officers or employees."

In searching for such a statute in A.R.S. and in the Session Laws, we have not been able to find any provisions specifically made pursuant to the terms of 38-611A. In the absence of such legislation, we believe that the advisory recommendation of the Personnel Administration Division, mandated by A.R.S. § 41-763(5) should be considered as governing until such time as that recommendation is acted upon by the Legislature.

Regarding your third question, we presume that by "session law" you mean temporary law, i.e., an enactment that will not be published as part of the Arizona Revised Statutes, in conformance with A.R.S. §§ 41-1304.01(4) and 41-1304.02. There appears to be no significance to whether the exercise of the Legislature's responsibility under A.R.S. § 38-611 takes the form of a "session law" or a statute.

Your fourth question involves several queries, each involving Art. 4, pt. 2, § 17 of the Arizona Constitution. That section provides in part that "The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the

contract entered into, nor shall the compensation of any public officer . . . be increased or diminished during his term of office . . ."^{5/} This provision prohibits any change in compensation for most public officers during such officers' terms of office. However, appointed public officers who serve at the pleasure of the appointing authority really do not have a "term of office." For example, such an officer may serve one year or forty years. Thus, such appointed officers would not fall within the constitutional prohibition against a change in compensation during a term of office. The Arizona Supreme Court has reached this same conclusion. In State ex rel. Colorado River Commission v. Frohmiller, 46 Ariz. 413 (1936), the court held that Art. 4, pt. 2, § 17 of the State Constitution applied only to public officers who have fixed terms of office. The Court stated:

The question of whether such an officer is subject to the constitutional provisions of this nature has been before the courts many times, and it has been held practically universally that such provisions apply only to public officers, appointive or elective, who have a fixed term, and not to those who hold only at the pleasure of the appointing power. Baley v. Garrison, 190 Cal. 690, 214 Pac. 871; Somers v. State, 5 S.D. 321, 58 N.W. 804; State v. Board of Commrs., 29 N.M. 209, 222 Pac. 654, 31 A.L.R. 1310; State v. Gordon, 238 Mo. 168, 142 S.W. 315, Ann. Cas. 1913A 312; Commissioners of Muskogee County v. Hart, 29 Okl. 693, 119 Pac. 132; Lexington v. Rennick, 105 Ky. 779, 49 S.W. 787, 50 S.W. 1106. While the question has never been expressly determined in this jurisdiction, we think we have indicated our opinion thereon three time. * * *

citations omitted We are of the opinion, following the overwhelming weight of authority, that the provisions of section 17, part 2, article 4, supra, do not apply to public officers who have no fixed or definite term of office but hold merely at the will of the appointing power. 46 Ariz. at 423-24.

^{5/} There are exceptions to this prohibition, but they are not relevant to the issue discussed here. See complete text of Art. 4, pt. 2, § 17, Arizona Constitution.

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Therefore, in regard to your fourth question, it is our opinion that an appointive public officer's salary may be increased, through the appropriate statutory procedure, during such officer's tenure only if the officer has no fixed term of office.

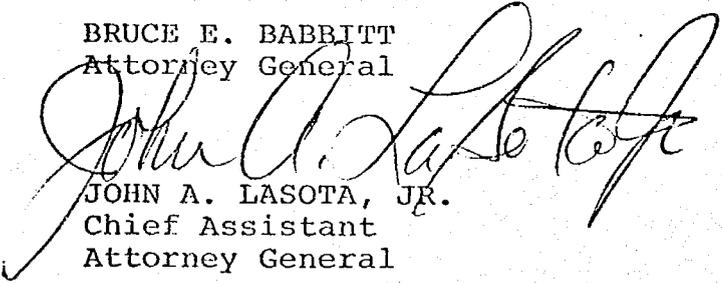
Regarding your fifth question, this office held in a 1970 Opinion (A.G. Op. 70-21) that a change in the compensation of a State officer is not prohibited by Art. 4, part 2, section 17 "when the change is intended to maintain the purchasing power of the officer's initial compensation." After thorough research and reflection, we have considerable doubt about the validity of that conclusion, considering the unequivocal language of the Constitution (quoted above). However, given the long-standing practice of granting such increases, and the obvious hardship that would be involved in the rescission of increases already granted, we would simply advise that any further increases be carefully considered in light of the clear language of Art. 4, part 2, section 17.

In response to your sixth and final question, Art. 5, section 7 of the Arizona Constitution provides may only "line item veto" one or more items in a multi-item appropriations bill. No similar authority exists for selective vetoing of a regular bill. If an enactment setting forth the salaries of "exempt" positions contains no appropriation, then it is not subject to "item veto."

If you have any further questions, please contact us.

Sincerely,

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Attorney General



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