

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

October 23, 1990

Mr. Charles W. Herf
Gaston & Snow, Attorneys
4722 North 24th Street
Phoenix, Arizona 85016

Re: I90-095 (R90-111)

Dear Mr. Herf:

Pursuant to A.R.S. § 15-253(B), we have reviewed your opinion dated July 31, 1990 to the Glendale Union High School District Superintendent concerning the school district's 1990 override election and the award of a one year increase in the school district's flexible benefit program (fringe benefit plan) to its employees. We concur with your conclusions that the school district may award a one-time contribution of \$1,000.00 to its employees as part of its fringe benefit plan which is funded in whole or in part out of override election proceeds, and that the fringe benefit plan may allow employees to use the \$1,000.00 fringe benefit to defray increasing dependent costs, to purchase dental insurance, to pay life insurance premiums or to be paid as salary less tax withholdings.

As to the tax sheltered annuity option, we revise to the opinion to conclude that such contributions may be paid from the employee's regular salary as authorized by the employee, but may not be paid from school district funds.

A.R.S. § 15-121 provides for the participation in tax sheltered annuities as follows:

B. Upon election by an employee to participate in the federal annuity plan, the governing board of a school district . . .

shall invest an amount to be reduced from the regular annual salary of the employees, as the employee may authorize, in annuities as provided in 26 United States Code, § 403.

.
D. State, county, district or other public funds shall not be used in the purchase of any annuity authorized by this article.

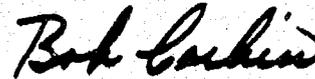
(Emphasis added.)

In Ariz. Att'y Gen. Op. I81-136 we agreed that "a school district may, in accordance with a teacher's authorization, reduce the teacher's salary and use the reduction to purchase annuities provided in 26 U.S.C. § 403." In addition, we clarified that

a fringe benefit package which is funded only with contributions from a school district may not include the purchase of an annuity as provided in 26 U.S.C. § 403. A fringe benefit package to which both the school district and the employee contribute may include the purchase of an annuity as provided in 26 U.S.C. § 403, but only to the extent of the employee's actual contribution, which is deducted from his or her . . . salary.

Thus, when an employee chooses a tax sheltered annuity pursuant to 26 U.S.C. § 403, contributions may be paid from the employee's regular salary, but may not be paid from school district funds earmarked for fringe benefits.

Sincerely,



BOB CORBIN
Attorney General

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July 31, 1990

WRITER'S DIRECT LINE

FILE NUMBER

Dr. Gerald E. George, Superintendent
Glendale Union High School
District No. 205
7650 North 43rd Avenue
Glendale, Arizona 85301

Re: 1990 Budget Override / \$1,000 Flexible Benefits
Package

Dear Jerry:

The District has requested that we review the validity of awarding a one year allowance of \$1,000 in a Flexible Benefits Package to District employees funded in part by recently approved override monies. The \$1,000 fringe benefit addition to District employees for only the 1990-1991 school year has been challenged as an unlawful "bonus." This letter summarizes applicable Arizona law and the relevant facts regarding the legality of the Governing Board's adoption of the meet and confer recommendations to award a one-year only increase in the District's flexible benefit program.

I. FACTS

A. Employee Salary and Benefit Program - 1990-1991:

Following the Override election, the District and its employees were involved in the "meet and confer" process to attempt to reach an agreement on a salary and a fringe benefit package to recommend to the Governing Board. A six percent salary raise was demanded during negotiations. It was rejected and a four percent salary increase with a one year fringe benefit allowance was recommended.

It was decided to recommend a \$1,000 one-year only contribution for all employees enrolled in the District's Flexible Benefits Plan. Dependent coverage for District employees had increased to over \$3,000 per year which is paid by the employee. The Plan provides employees with an option to apply \$1,000 to defray increasing dependent costs, purchase

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dental insurance, to pay life insurance premiums, or place the money in a tax-sheltered annuity. Alternatively, an employee may be paid the \$1,000 less tax withholdings.

B. 1990 Spring Override Election:

Prior to meet and confer, an override election was scheduled, and it ultimately was successful. The purpose of the override election was to prevent major budget cuts and to retain programs staffed by District employees. The ability to staff programs means the ability to hire and compensate employees responsible for these programs.

A part of the \$1,000 one time allocation to the District's Flexible Benefits Plan is to be paid out of the override money. As the \$1,000 amount is a one-year only fringe benefit, it will not be required to fund salary or fringe benefits to employees for the 1991-1992 or subsequent school years.

II. SUMMARY OF APPLICABLE ARIZONA LAW

Title 15 provides for the Governing Board to fix the salaries of its employees who are necessary for the succeeding year:

A. The governing board may at any time employ and fix the salaries of teachers, principals, janitors, attendance officers, school physician, school dentist, nurses and other employees necessary for the succeeding year. The governing board may provide for employee fringe benefits, including sick leave, personal leave, vacation and holiday pay, jury duty pay, merit pay, pay bonuses and other benefits. A contract for the next ensuing year includes only the employee fringe benefits which the governing board adopts for the next ensuing year before it offers the contract. The contracts of all certificated employees shall be in writing, and all employees shall be employed subject to the provisions of Section 38-481.

A.R.S. § 15-502(A) (emphasis added). Consequently, the District has the power to budget for employees fringe

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benefits. All of the facts related to us as the basis for this opinion appear to indicate the one time allotment of \$1,000 for employees is a fringe benefit.

Arizona law also provides for override elections for the purpose of presenting the proposed budget to the electorate when the proposed budget includes an increase of more than the aggregate budget limit for the budget year:

B. The county superintendent shall prepare an informational report on the proposed increase in the budget and a sample ballot and at least two weeks prior to the election shall transmit the report and the ballot to the governing board of the school district. For a school district located in a county with a population of 200,000 persons or more, the governing board, upon receipt of the report and the ballot, shall mail or distribute the report and the ballot to households, in which qualified electors reside, within the school district at least 10 days prior to the election. . . . The report shall contain the following information:

. . . .

8. The dollar amount and the purpose for which the proposed increase in the budget is to be expended for the first year for which the budget increase was adopted.

A.R.S. § 15-481(B)(8) (emphasis added). The District listed programs to be funded from the override. Employees staff and supervise these programs. The electorate approved the override. The District has complied with A.R.S. § 15-481(B)(8), and salary and fringe benefits are a lawful use of the override monies.

A school district may provide its employees with a "flexible fringe benefits package," and the District may pay employees a lump sum payment for the unexpended amount of the fringe benefit package. Az.Ag.Att'y.Op. 184-051. The Attorney General agreed that A.R.S. § 15-501 gives the Governing Board

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broad authority to compensate teachers for their services, and that a benefit package would not constitute a gift, but would form a part of the compensation earned by the employee and bargained for as part of the employee's contract with the school district. Id.

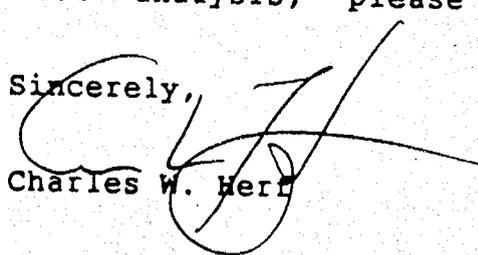
Several Attorney General opinions have held that districts may contract to pay bonuses if the bonuses are part of the compensation package provided for in the contracts entered into by the District and its employees. See, e.g., Az.Ag.Att'y.Ops. I84-034; I81-079; I80-027; I79-278; I79-121; I78-201; I76-238; I76-178; I71-16. If the "bonus" is part of a bargained for exchange for employee services, such a bonus is not a "gift," and therefore, does not violate Article IX, § 7 of the Arizona Constitution, which prohibits any subdivision of the state from making a give to an individual. However, although legal, the facts do not support the conclusion that the one-time payment to the flexible benefit plan was a "bonus." It is a fringe benefit agreed to in meet and confer and approved as such by the Governing Board.

III. CONCLUSION

The \$1,000 contribution per employee to the District's Flexible Benefits Plan for 1990-1991 is permissible under Arizona law. The Attorney General has expressly approved such flexible benefit programs. The Governing Board's action in awarding its employees a one-time contribution of \$1,000 as a part of its fringe benefit program and funding such payment, in part or in whole out of override proceeds, is consistent with Arizona law.

Pursuant to A.R.S. § 15-253(B), a copy of this opinion is being forwarded to the Arizona Attorney General for review. After you have had an opportunity to review this letter or if you have any questions concerning our analysis, please do not hesitate to call me.

Sincerely,


Charles W. Herr

AEH/CWH/jes
cc: Robert K. Corbin, Esq.
Attorney General
Governing Board Members

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