



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

July 16, 1985

Mr. John T. Hestand
Deputy Pinal County Attorney
Post Office Box 887
Florence, Arizona 85232

Re: I85-093 (R85-078)

Dear Mr. Hestand:

Pursuant to A.R.S. § 15-253.B, we concur with the opinion expressed in your letter to Dr. Clark Stevens, Superintendent of the Casa Grande Union High School District, that a teacher employment contract may be executed prior to May 15 and include a salary increase conditioned specifically on the District's receipt of sudden growth funds pursuant to A.R.S. § 15-948 after the term of the contract begins.

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN
Attorney General

BC:FWS:lfc:tb

ROY A. MENDOZA
PINAL COUNTY ATTORNEY

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PINAL COUNTY
FLORENCE, ARIZONA 85232

April 23, 1985

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DIRECTOR, DEFERRED
PROSECUTION PROGRAM

RAY R. VASQUEZ
INVESTIGATOR

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Rec'd 5-14-85
1285-078

EDUCATION OPINION

ISSUE NO LATER THAN

JULY 13, 1985

Dr. Clark Stevens, Superintendent
Casa Grande Union High School District
420 E. Florence Boulevard
Casa Grande, Arizona 85222

Dear Dr. Stevens:

You requested a County Attorney's opinion.

QUESTION:

Is it possible to draft a document which would allow the District to contract now to increase teachers' salaries contingent upon the District receiving a specified level of Sudden Growth Funds?

ANSWER:

See body of opinion.

OPINION:

The Casa Grande Union High School District is currently engaged in salary negotiations with its teaching staff. The District utilizes a salary schedule which bases compensation upon education and years of service to the District/years of experience. The District's Governing Board is highly desirous of increasing the salary schedule for its teaching staff, but is faced with rather severe economic restrictions. Based upon the financial data currently available, the District Governing Board economically cannot give the type of pay raise to its certified staff which it desires to give.

The District does, however, anticipate that it will have a significant increase in the number of students attending during the 1985-86 school year. A significant increase in the number of students would make the District eligible for "Sudden Growth Funds" which it otherwise would not receive. The purpose of these funds is to mitigate against the economic impact of a sudden increase in student enrollment. Clearly though,

Dr. Clark Stevens
Page 2
April 23, 1985

the District cannot base its salary schedule on a condition which might never materialize, for to do so would be to court financial disaster. The District Governing Board would be willing, assuming it was legal, to utilize Sudden Growth Funds to raise the teachers' annual salaries.

A school district has a great deal of leeway in deciding what salary and fringe benefits it will grant to its employees. This was noted in Attorney General Opinion 77-172 dated September 2, 1977. In that opinion, the Attorney General's Office stated: "A.R.S. §15-443.A (now 15-502) generally authorizes a board of trustees to employ and fix the salaries of its employees. This section also is applicable to boards of trustees other than those for common schools. See A.R.S. §§15-496 and 15-545(A). Now 15-101 and 15-722. As you correctly pointed out in your opinion, boards of trustees generally have broad powers to fix fringe benefits for their employees, as analyzed in Attorney General Opinion No. 60-24." (Emphasis not in the original.) See also Attorney General Opinion 80-138.

A governing board has the statutory authorization to set the salaries for its employees and such a program will be legal if it has a reasonable basis. A governing board also has strict limitations on when it can set the salaries for its employees. In Taft v. Bean, 538 P.2d 1165, 24 Ariz.App. 364, 367 (1975), the Arizona Court of Appeals for Division I noted: "It appears that a school board can fix salaries of a teacher at any time prior to the signing of the contract...." The opinion goes on to note the restrictions on reduction of salaries which is not applicable in this case.

Therefore, while the Board has wide discretion in the setting of salaries and fringe benefits, it has this discretion only prior to the signing of contracts by the teachers. See Attorney General Opinion 80-27. Arizona has a constitutional provision which prohibits gifts of public funds. See Arizona Constitution, Article 4, Part 2, Section 17. This was explained by the Arizona Supreme Court in Prescott Community Hospital Commission v. Prescott School District No. 1 of Yavapai County, Arizona, 57 Ariz. 492, 115 P.2d 160 (1941). In that case, the district had leased an unused school building for one dollar per year. The building was to be used as a hospital. At 57 Ariz. 494, 495, the Court stated: "School districts are created by the state for the sole purpose of promoting the education of the youth of the state. All their powers are given them and all the property which they own is held by them in trust for the same purpose,

Dr. Clark Stevens
Page 3
April 23, 1985

and any contract of any nature which they may enter into, which shows on its face, that it is not meant for the educational advancement of the youth of the district but for some other purpose, no matter how worthy in its nature, is ultra vires and void.... [S]chool districts are not permitted to give away the property of a district even for the most worthy purpose...."

The Attorney General has issued a number of opinions indicating that it is a violation of the Arizona Constitution to provide extra compensation to a public employee for services already rendered or for which the employee is already contractually obligated to provide. It is a gift of public monies to pay a teacher a salary, in excess of the amount provided for by the contract, for the services which were the basis of the contract. See Attorney General Opinions 83-065, 82-137, 81-79 and 80-27.

In 1980 the Cochise Attorney's Office issued an opinion in which the Attorney General concurred (Attorney General Opinion 80-27). In the County Attorney's opinion, the then Chief Deputy, Max Jarrett, explained, "It is a generally accepted rule of law that an agreement to pay additional compensation for the performance of obligations already agreed to is invalid for want of consideration."

The preceding paragraphs make it clear that the District cannot legally contract to pay its teachers a specified salary now and then unilaterally raise that salary in February of 1986 without a valid provision of the 1985-86 contract.

The question then becomes whether the District can structure a contract which allows for additional payments to teachers based upon the occurrence of a contingency. The answer is yes, with restrictions. In Attorney General opinion 81-79, the Attorney General indicated that it was legal to pay a teacher a higher salary in his/her final year of teaching. He stated:

Where a school board has adopted a policy to pay a teacher a higher salary for his or her final year of teaching before retirement, prior to the time the teacher enters into an employment contract for the final year of teaching, the policy may be deemed a part of the employment agreement. The benefit thus becomes part of the bargained-for exchange given for the services rendered by the teacher during his or her

Dr. Clark Stevens
Page 4
April 23, 1985

final year of employment. The "extra payment," in other words, is simply part of the teacher's salary and part of the bargained-for contractual obligation of the school board, and not a gift. Not being a gift, the additional payment is not subject to the prohibition of Article IX, Section 7, of the Arizona Constitution and is otherwise permissible.

It would be legal for the District to bargain with its teachers and to adopt a contract which contains a condition precedent. Arizona law requires certain factors to exist before an enforceable contract is created. There must be an offer, an acceptance, consideration and sufficient specification of terms so that obligations involved can be ascertained. See K-Line Builders, Inc. v. First Federal Savings & Loan Association, 139 Ariz. 209, 677 P.2d 1317 (1984). In the case at hand, the District will be offering a contract of employment which the teachers will presumably accept. There will be consideration on the part of the District in its agreement to pay the teachers their salaries and fringe benefits and, on the part of the teachers, in their agreements to perform teaching duties. If the District were to offer the teachers a specific salary, there would be sufficient specification of this term so that the obligations involved could be ascertained.

There is a principle of law which could allow the District to achieve its goal, i.e., the legal theory of a condition precedent to a contract. First, it is necessary to define what a condition precedent actually is. In Sweet v. Stormont Vail Regional Medical Center, 647 P.2d 1274 (1982), the Supreme Court of Kansas stated:

A condition precedent is something that it is agreed must happen or be performed before a right can accrue to enforce the main contract. It is one without the performance of which the contract, although in form executed and delivered by the parties, cannot be enforced. A condition precedent requires the performance of some act or the happening of some event after the terms of the contract, including the condition precedent have been agreed on before the contract shall take effect.

Dr. Clark Stevens
Page 5
April 23, 1985

Another definition was provided by the Supreme Court of Washington in Ross v. Harding, 391 P.2d 526 (1964): "'Conditions precedent' are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." See also Matter of Estate of Dillon, 575 P.2d 127 (Okla.App. 1978); Handley v. Ching, 627 P.2d 1132 (Hawaii, 1981).

As the Court of Appeals of Kansas noted in Barbara Oil Company v. Patrick Petroleum Co., 566 P.2d 389, 392 (1977):

Generally speaking, a contracting party may impose such conditions to the contract as he desires, assuming they are not illegal conditions. A proviso in a contract creates a condition, and the usage of the words 'subject to' usually indicates that a promise is not to be performed unless the condition is satisfied.

The Supreme Court of Nevada explained the purpose of a condition precedent in McCorquodale v. Holiday, Inc., 518 P.2d 1097 (1974): "A promisor's purpose in attaching a condition precedent to his promise and the legal effect in doing so is to narrow the promisor's obligation so that he will not have to perform if the event fails and can never happen."

By applying the law to the case at hand, the Board could offer the teachers a contract containing a condition precedent. The contract would offer the teachers a specified amount of compensation for teaching the 1985-86 school year. In the event that the District receives a specified amount of Sudden Growth Funds then, and only then, would the teachers receive the specified amount plus "X" dollars.

Arizona recognizes the contractual principle of condition precedent, but it is not favored by the Courts. See Watson Construction Company v. Reppel Steel & Supply Company, Inc., 598 P.2d 116, 123 Ariz. 138 (1979). This means that such provisions are perfectly legal and proper, but it must be very clear that a condition precedent is what the parties actually intended. This was explained by the Arizona Supreme Court in Angle v. Marco Builders, Inc., 626 P.2d 126, 128 Ariz. 396, 399-400 (1981).

Dr. Clark Stevens
Page 6
April 23, 1985

The parties are at liberty to agree upon a condition precedent upon which their liability shall depend. However, the rule is that to make a provision in a contract a condition precedent, it must appear from the contract itself that the parties intended the provision so to operate...It has been said that conditions precedent are not favored and the courts will not construe stipulations to be such unless required to do so by plain, unambiguous language or by necessary implication.

Therefore, if the District is going to utilize a condition precedent, it must make it clear in the document that that is the intent. This contractual theory is commonly utilized in teaching contracts in a related manner. It is not unusual to issue teaching contracts with conditions concerning override elections. These contracts provide that if the override does not pass, the teachers will receive a certain amount. If the override does pass, then the teachers will receive a greater salary. The same legal theory allows the option listed in this opinion. I will work with your District to arrive at a clear wording to implement the goals of the District. I would recommend making the contingent nature of this provision very clear during the negotiation process.

The Board must realize that if the condition is realized, and the teachers are granted additional compensation pursuant to the contract, that becomes part of their contractual compensation and, at least as to continuing teachers, it cannot be reduced in the 1986-87 school year without utilizing the provisions of A.R.S. §15-544.

As always, please do not hesitate to contact me if I can be of assistance.

Sincerely,

ROY A. MENDOZA
PINAL COUNTY ATTORNEY



John T. Hestand
Deputy County Attorney

JTH/mlr