Opinion

Christine O. Gregoire — Attorney General of Washington

COLLEGES AND UNIVERSITIES - STATE EMPLOYEES - SALARIES AND WAGES - COMPENSATION - BUDGET AND APPROPRIATION ACTS - APPROPRIATIONS - Extent to which a university may vary individual salary increases given language in operating budget appropriation funds for an "average" increase.

1. Under the language of the 1997-99 operating budget, a university may grant individual salary increases larger or smaller than the average 3.0 percent increase funded by legislative appropriation.

2. A university may use its 1997-99 budget appropriation in part to remedy salary disparities discovered by the university through studies or other means.

3. Under the 1997-99 budget act, a university may honor increases previously agreed to in collective bargaining agreements, using "local" or non-appropriated funds for any portion of the increase which the Legislature has declined to fund with its biennial appropriation.

4. If the Legislature fails to appropriate funds for a salary increase for university employees, the extent to which the university may fund such increases with non-appropriated funds depends on the language of the budget act covering the period in question.

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October 28, 1998

Dr. Ivory V. Nelson, President
Central Washington University
Barge 314
400 East 8th Avenue
Ellensburg, WA 98926-7500

Cite As:
AGO 1998 No. 12

Dear Dr. Nelson:

By letter previously acknowledged, you have requested an opinion on several questions we have renumbered and paraphrased as follows:

1. May the Central Washington University (CWU) Board of Trustees authorize the university president to grant individual salary increases to members of the

faculty, exempt staff, or classified staff in amounts greater than the 3.0 percent increase provided by the Legislature in the 1997-99 biennial budget?

2. If the university has conducted a faculty and exempt staff salary study and the university has found salary disparity based on gender, age, and/or ethnicity, may the Board of Trustees authorize the president to use any source of funds to increase individual salaries by amounts greater than the 3.0 percent increase provided in the biennial budget, for the purpose of correcting the disparity?

3. If the university, through a systematically-defined faculty and exempt staff salary study, finds salary disparity resulting from salary compression, may the Board of Trustees authorize the president to use any source of funds to increase individual salaries by amounts greater than the 3.0 percent increase provided in the biennial budget, for the purpose of correcting the disparity?

4. If the university has a contract or bargaining agreement providing for incremental salary increases each year, and if this increase would be greater than what the Legislature has appropriated for a given year, may the university use local funds or other fund sources to provide for the difference between the appropriated amount and the increases called for in the contract?

5. If the university has not fully expended its salary funds in a previous year, may the university use some or all of the dollars remaining from the previous year to address salary inequities in the present year?

6. In a year in which the Legislature fails to appropriate funds for salary increases, may the university use any source of funds to increase individual salaries for the purpose of correcting disparities, or for other reasons?

BRIEF ANSWERS

In any given year, the authority of CWU to grant salary increases depends on the language of the current appropriations law. In the 1997-99 biennium, the Legislature has limited the university's use of general fund appropriations to *an average 3.0 percent salary increase*. This language does not preclude the university from granting individual increases which are greater or smaller than 3.0 percent, so long as the increases granted average out at 3.0 percent and do not result in an over-expenditure of the appropriation. The current budget does not prevent the university from using certain other appropriated funds, or non-appropriated local funds, for additional salary increases for the purpose of correcting disparities or for other lawful purposes. These observations relate to the faculty and exempt staff of the university, as the salaries of classified employees are determined by the Personnel Resources Board. The authority of the university to grant salary increases in any future year would depend on the state of the law at the time, including the language of the operating budget for the year in question.

ANALYSIS

Central Washington University (CWU) is designated a regional university in RCW 28B.35.010. It is governed by an eight-member board of trustees appointed pursuant to RCW 28B.35.100. A state-owned university or college possesses only that authority which the Legislature has explicitly granted to it, or those powers necessarily implied by the express authority granted. See, Green River Comm'ty College v. Higher Educ. Personnel Bd., No. 10, 95 Wn.2d 108, 622 P.2d 826 (1980). The CWU board of trustees is expressly granted the power to ". . . employ the president of the regional university, his assistants, members of the faculty, and other employees of the institution, who, except as otherwise provided by law, shall hold their positions, until discharged therefrom by the board for good and lawful reason." RCW 28B.35.120(2). Although the point has apparently never been explicitly considered by the courts before, we would read this authority as including the power to set the compensation of university officers and employees, except where the Legislature has specifically provided otherwise.[1]

The Legislature has "provided otherwise" as to certain aspects of a university's authority to fix the compensation of its employees. As discussed more fully below, the authority to fix the salaries of classified employees of higher education institutions has been vested in the Personnel Resources Board rather than in each university's board of trustees. RCW 41.06.150-.165. Furthermore, the Legislature, which provides most of the funding for university operations through its biennial state operating budget, has chosen to limit the use of state appropriated funds for salary increases through language in the biennial budgets.[2]

The Budget and Accounting Act strictly requires all state agencies and institutions to spend appropriated funds in accordance with the terms and conditions imposed by the Legislature:

> No state officer or employee shall intentionally or negligently: Over-expend or over-encumber any appropriation made by law; fail to properly account for any expenditures by fund, program, or fiscal period; or expend funds contrary to the terms, limits, or conditions of any appropriation made by law.

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[1] Unlike the trustees of community and technical colleges, the trustees of the four-year higher education institutions do not have *express* authority to fix the compensation of their employees. Cf. RCW 28B.50.140. However, this power may be implied from the authority of the universities to employ and from the authority of the trustees to have ". . . full control of the regional university and its property of various kinds, except as otherwise provided by law. . . ." RCW 28B.35.120(1).

[2] In AGO 1987 No. 6 we concluded that the legislature may not, without amending permanent law, eliminate or limit the authority of community college districts to grant salary increases to district employees. However, we expressed the opinion that the legislature could use conditions in the biennial appropriation act to limit the use *of the funds appropriated in that act*. The same analysis would apply to an appropriation for a regional university.

RCW 43.88.290. The same act provides for civil penalties, reimbursement for damages, and forfeiture of office by an officer violating the act. RCW 43.88.300.

With this background, we turn to the current biennial budget act language bearing upon salary increases. Laws of 1997, ch. 454, § 601, provides:

> The appropriations in sections 603 through 609 of this act are subject to the following conditions and limitations:
>
> (1) "Institutions" means the institutions of higher education receiving appropriations under sections 603 through 609 of this act.
>
> (2)(a) The salary increases provided or referenced in this subsection *shall be the allowable salary increases* provided at institutions of higher education, *excluding* increases associated with normally occurring promotions and *increases related to faculty and professional staff retention*, and excluding increases associated with employees under the jurisdiction of chapter 41.56 RCW pursuant to the provisions of RCW 28B.16.015.
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> (b) Each institution of higher education *shall provide* to each classified staff employee as defined by the office of financial management a salary increase of 3.0 percent on July 1, 1997. Each institution of higher education *shall provide* to instructional and research faculty, exempt professional staff, academic administrators, academic librarians, counselors, teaching and research assistants as classified by the office of financial management, and all other nonclassified staff, including those employees under RCW 28B.16.015, *an average salary increase of 3.0 percent on July 1, 1997*. For employees under the jurisdiction of chapter 41.56 RCW pursuant to the provisions of RCW 28B.16.015, distribution of the salary increases will be in accordance with the applicable collective bargaining agreement. However, an increase shall not be provided to any classified employee whose salary is above the approved salary range maximum for the class to which the employee's position is allocated. To collect consistent data for use by the legislature, the office of financial management, and other state agencies for policy and planning purposes, institutions of higher education, shall report personnel data to be used in the department of personnel's human resource data warehouse in compliance with uniform reporting procedures established by the department of personnel.
>
> (c) Each institution of higher education receiving appropriations under sections 604 through 609 of this act *may provide* to instructional and research faculty, exempt professional staff, academic administrators, academic librarians, counselors, teaching and research assistants, as classified by the office of financial management, and all other nonclassified staff, but not including employees under RCW 28B.16.015, *an additional average salary increase of 1.0 percent on July 1, 1997, and an average salary increase of 2.0 percent on July 1, 1998. Any salary increases authorized under this subsection (2)(c) shall not be included in an institution's salary base*. It is the intent of the legislature that *general fund-state support* for an institution *shall not increase during the current or any future biennium* as a result of any salary increases authorized under this subsection (2)(c).

(d) Specific salary increases authorized in sections 603 through 609 of this act are in addition to any salary increase provided in this subsection.

Id. (Italics added.)

Laws of 1997, ch. 454, § 607 contains the biennial operating appropriations for Central Washington University. Therefore, CWU is clearly subject to the language in § 601 of the budget, quoted just above.

There are several points to note about the language chosen by the Legislature in the 1997-99 operating budget. First, the budget language contains examples of both "shall" and "may." For example, in § 601(2)(b), the salary increases set forth "shall" be provided, but those mentioned in subsection (2)(c) "may" be provided. Our court has found that the use of "shall" and "may" in the same statute ". . . indicates that the Legislature intended the two words to have different meanings: "may" being directory while "shall" being mandatory. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994), citing State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

Second, the Legislature, in the current budget, has distinguished between fixed salary increases and "average" increases. Thus, in subsection (2)(b) of § 601, the institutions of higher education "shall provide" an increase to each classified staff employee an increase of 3.0 percent. By contrast, the institutions shall provide all other employees with ". . . average salary increases of 3.0 percent. . . ." As with "shall" and "may," we will interpret the distinctions between these phrases as intentional, and significant.

With this background in mind, we turn to your specific questions:

1. **May the Central Washington University (CWU) Board of Trustees authorize the university president to grant individual salary increases to members of the faculty, exempt staff, or classified staff in amounts greater than the 3.0 percent increase provided by the Legislature in the 1997-99 biennial budget?**

To answer this question, we will examine the provisions in § 601 in the budget act, noting especially the use of "shall" and "may" and the nature of the salary increases authorized by the Legislature. The first information useful to your answer is found in subsection (2)(a), which provides that the allowable salary increases exclude: increases associated with normally occurring promotions[3], increases related to faculty and

[3] At this point we should make some observations about promotions. As we indicate in the main text, an average salary increase of 3.0 percent does not mean a 3.0 percent increase for each employee. Rather it means that the salary increases in total shall not exceed 3.0 percent of the total base salaries of all employees covered by the appropriation. Thus, if an employee is promoted to an existing position which has been vacated by another incumbent, there will, in most situations, be no impact on the "3.0 percent" provision because the promoted employee has succeeded to his/her predecessor's salary and there is, thus, no increase in the total payroll. To interpret the "average of 3.0 percent" language, it is better to look at the salary associated with a position rather than

professional staff retention, and increases associated with employees under the jurisdiction of chapter 41.56 RCW pursuant to the provisions of RCW 28B.16.015. An institution need not "count" these three types of increases in calculating the amount the Legislature has authorized for increases elsewhere in the budget.

Next, subsection (2)(b) mandates, for *classified* employees, an increase of 3.0 percent on July 1, 1997. The use of "shall" indicates that this increase is mandatory, not discretionary with the institution. The use of "3.0 percent," without any modifier, indicates that each classified employee is to receive exactly 3.0 percent. Thus, as to this category of employees, the institution has no discretion either to withhold the increase or to change its amount.[4]

The next part of subsection (2)(b) provides that each institution "shall provide" an increase to faculty, exempt professional staff, administrators, and other nonclassified staff, ". . . *an average salary increase of 3.0 percent. . . .*" Here, the use of "shall" indicates that the institution must grant salary increases to these categories of employees.[5] However, the use of the phrase "an average salary increase" indicates that the institution is *not* required to give an "across the board" 3.0 percent increase. Although an institution could comply with the statute by granting such an "across the board" increase, it could also set individual increases which are higher or lower than 3.0 percent, as long as 3.0 percent is the "average."

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the salary paid to any individual employee. We discussed this issue at some length in AGLO 1976 No. 39 (copy attached).

As we noted in AGLO 1976 No. 39, there are two situations in which promotions may present problems under the appropriation. The first is when the person being promoted assumes the new position at a higher rate than the predecessor was paid. Since the promotion to an existing position clearly involves a position covered by the appropriation language, any increase granted above the level existing for the position at the time of the increase would be an increase within the meaning of the budget act. However, such an increase would be within the allowable "exceptions" in the budget and could, therefore, be paid out of "local funds.

The second situation is when the promotion is made to a newly created position. As we concluded in AGLO 1976 No. 39, the salary initially established for the position and paid to its first incumbent does not constitute an "increase" within the meaning of the act. For these positions, it makes no difference if the position is filled by the promotion of a current employee or through the hiring of a new employee. Either way, the initial salary paid should logically be excluded from the base in calculating the amount of "increase" paid by the university to its employees.

We emphasize, of course, that this analysis applies only if the new position is bona fide and promotion to it involves an increase in duties and responsibilities as well as a new salary. Otherwise, a "promotion" could simply be a subterfuge to evade the legislative limitation on salary increases.

[4] As noted earlier, the salary schedules for classified university employees are adopted by the Personnel Resources Board under RCW 41.06.150 through .165. Presumably the Personnel Resources Board has acted to implement the 3.0 percent increase by revising its schedule. The appropriation is provided to CWU and other institutions because they pay the employees, though they do not determine their compensation.

[5] We do not understand the legislature to be mandating any specific minimum salary increase for any single employee. The mandatory language relates to the employees as a class, not as individuals.

Subsection (2)(c) provides additional increases, with some strings. Under this subsection, each higher education institution "may provide" nonclassified staff (except those covered by RCW 28B.16.015) with ". . . an additional average salary increase of 1.0 percent on July 1, 1997, and an average salary increase of 2.0 percent on July 1, 1998." Here the language ("may") is clearly discretionary, not mandatory. Thus, CWU could choose not to provide any additional increases under this subsection. And here, again, the increases authorized are "average," so that an institution may grant any individual employee either more or less than the "average," so long as the total granted does not exceed the "average" authorized.[6]

Finally, subsection (2)(d) provides that the increases in § 601 of the budget shall be "in addition" to specific salary increases authorized in sections 603 through 609. CWU did receive appropriations which might meet this description. Section 607(3) provides the university with $70,000 in each fiscal year ". . . solely to recruit and retain minority students and faculty." Section 607(4) provides $51,000 in each fiscal year ". . . solely for competitively offered faculty recruitment and retention salary adjustments." Some portion of these small appropriations might be used to recruit or retain faculty through salary increases.

To summarize our answer to your first question, the 1997-99 operating budget would not permit CWU to decide the salary increases of classified employees; these are determined by the law itself. As to other categories of employee, some individual increases could exceed 3.0 percent, so long as the "averages" and other limitations established in the budget are met. Finally, the limitations are on increases granted from state appropriated funds. By contrast, the 1975 Legislature prohibited additional salary increases "from any fund source." See, Laws of 1975-76, 2nd Ex. Sess., ch. 133, § 6(3).

2. **If the university has conducted a faculty and exempt staff salary study and the university has found salary disparity based on gender, age, and/or ethnicity, may the Board of Trustees authorize the president to use any source of funds to increase individual salaries by amounts greater than the 3.0 percent increase provided in the biennial budget, for the purpose of correcting the disparity?**

3. **If the university, through a systematically-defined faculty and exempt staff salary study, finds salary disparity resulting from salary compression[7], may the Board of Trustees authorize the president to use**

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[6] We will not repeat the conditions imposed by the Legislature on these increases, but they are clearly set forth in the text of the subsection.

[7] We understand the term "salary compression" to refer to the situation arising when a new faculty member or administrator is hired at an initial salary greater than current employees with comparable experience, duties and responsibilities. For instance, A may have been hired in 1988, and now has ten years of experience in a certain position at the university. Because the legislature has consistently limited salary increases, A's salary, even if A received the maximum permitted in each budget cycle, has increased only modestly during A's ten year tenure. If B is hired today into a job comparable to A's position, market conditions may require the university to pay B

any source of funds to increase individual salaries by amounts greater than the 3.0 percent increase provided in the biennial budget, for the purpose of correcting the disparity?

We would answer these two questions in the affirmative. As we noted in our answer to Question 1, the 1997-99 budget, as to both faculty and exempt staff, authorizes an "average" salary increase of 3.0 percent. The university could vary the actual amount granted to individual employees, using its discretion over individual increases to implement the results of disparity studies, so long as the university stays within the mandated "average."[8]

4. **If the university has a contract or bargaining agreement providing for incremental salary increases each year, and if this increase would be greater than what the Legislature has appropriated for a given year, may the university use local funds or other fund sources to provide for the difference between the appropriated amount and the increases called for in the contract?**

We note, first of all, that this question does not apply to classified university employees, since the salaries of this group are set by the Personnel Resource Board.

Based on the reasoning of our answer to your first question, if the university has a contractual obligation to increase certain salaries each year, it will have to meet that obligation. A separate question arises, though, whether the university may use state-appropriated funds to meet the obligation. If not, the university may have to use non-appropriated funds for that purpose. The answer depends on the nature of the obligation and on the specific budget language covering the situation.

The 1997-99 operating budget recognizes some contractual obligations. Laws of 1997, ch. 454, § 601(2)(b) identifies one group of employees with a contract as ". . . employees under RCW 28B.16.015. . . ." RCW 28B.16.015 permits an institution and the exclusive bargaining representative of a bargaining unit of employees classified under the personnel system to have their ". . . relationship and corresponding obligations governed entirely by the provisions of chapter 41.56 RCW. . . ."[9] The current budget provides that ". . . [f]or employees under the jurisdiction of chapter 41.56 RCW pursuant to the provisions of RCW 28B.16.015, distribution of the salary increases will be in

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considerably more than A is earning. If A and B have substantially equivalent qualifications and responsibilities, this situation produces a disparity between the salaries of A and B.

[8] It is well to remember at this point that §601(2)(a) of the 1997-1999 budget act excludes "increases related to faculty and professional staff retention" from the base for purposes of calculating the allowable maximum salary increases. We will not hear attempt to define "faculty and professional staff retention"; this issue is beyond the scope of your question.

[9] Chapter 41.56 RCW contains the statutes relating to collective bargaining for public employees.

accordance with the applicable collective bargaining agreement. . . ."[10] Laws of 1994, ch. 454, § 601(2)(b).

As to other groups, the 1997-99 budget makes it clear that the use of state-appropriated funds is limited to the percentage increases discussed above. While the university may use appropriated funds to meet its contract obligations so long as it stays within the limits established in the budget, the university would have to find other, non-appropriated funds to meet any "gap" between the legislatively authorized expenditures and the contract obligations in question.

All of our discussion assumes the existence of an enforceable contract obligation by the university to some group of employees. We will not attempt here to outline which contracts or collective bargaining agreements are enforceable. In Carlstrom v. State, 103 Wn.2d 391, 694 P.2d 1 (1985), the State Supreme Court found that a community college had lawfully bargained for a salary increase which the Legislature could not constitutionally impair (by reducing the amount appropriated and deferring the implementation of part of the increase). Since the Court was dealing with budget language actually purporting to change the increase negotiated in the contract, the Court did not deal with the more limited language employed by most recent legislatures: restricting the use of appropriated funds rather than restricting the amounts paid to meet contract obligations. We have suggested that, at least so long as an institution has local funds available to meet the "gap" between legislative appropriation and contract obligation, the courts are unlikely to mandate an increased legislative appropriation. AGO 1987 No. 6 at pp. 11-12 (fn. 6). See also AGO 1994 No. 16, in which we found that faculty at four-year state-supported higher education institutions did not have a right to engage in collective bargaining, but that an institution could voluntarily bargain with a group of employees under some circumstances, as more fully discussed in our earlier opinion.

To summarize, the current budget allows CWU some flexibility in using appropriated funds to meet contract or collective bargaining obligations, but the university would have to find non-appropriated funds to meet any contract obligation beyond the limits the Legislature has set on the use of appropriated funds. This answer could well change in future budget cycles, as the Legislature often varies the terms on which it appropriates funds for salary increases.

5. If the university has not fully expended its salary funds in a previous year, may the university use some or all of the dollars remaining from the previous year to address salary inequities in the present year?

If you are referring to funds appropriated by a previous legislature, the answer is no, because all appropriations ". . . shall lapse at the end of the fiscal period for which the

[10] However, the next sentence notes that ". . . an increase shall not be provided to any classified employee whose salary is above the approved salary range maximum for the class to which the employee's position is allocated."

appropriations are made to the extent that they have not been expended or lawfully obligated." RCW 43.88.140. Occasionally the Legislature may be persuaded to reappropriate certain funds which were not expended in the previous budget period, but such an act is a necessary prerequisite to their further use by an agency or institution.

By contrast, as discussed above, if the university has a pool of non-appropriated funds available to supplement the money appropriated by the Legislature, the current budget would not preclude the use of this "pool" for additional salary increases, so long as doing so would not increase the institution's salary base or increase the Legislature's obligation to appropriate funds during the current biennium or in future years.

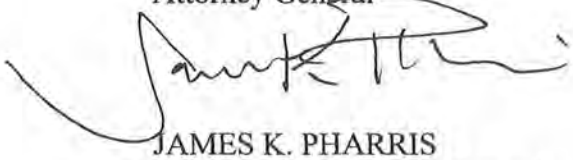
6. **In a year in which the Legislature fails to appropriate funds for salary increases, may the university use any source of funds to increase individual salaries for the purpose of correcting disparities, or for other reasons?**

The answer to this question depends on the language of the budget in effect at the time the situation occurs. As discussed above, the 1997 Legislature chose to limit the use of state-appropriated dollars to fund salary increases, but did not prohibit institutions from granting greater increases with non-appropriated dollars. Some past legislatures, however, have prohibited the use of "any funds" for salary increases. To the extent appropriated funds are not available to fund a salary increase, the university will want to assure itself that the funds used are lawfully available for that purpose, and that their use will not put the institution in violation of some other budget limitation or other statutory restraint.

We trust the foregoing will be of assistance.

Very truly yours,

CHRISTINE O. GREGOIRE
Attorney General



JAMES K. PHARRIS
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Enclosure: AGLO 1976 No. 39

AGLO 1976 No. 39 APPROPRIATIONS -- STATE -- COMMUNITY COLLEGES -- SALARIES -- LIMITATION UPON SALARY INCREASES FOR COMMUNITY COLLEGE EMPLOYEES.

Answers several questions pertaining to the average 5% salary increase provided for by § 6(3), chapter 133, Laws of 1975-76, 2nd Ex. Sess., for community college and other educational employees.

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June 15, 1976

Honorable John C. Mundt
Director, State Board for
Community College Education
319 Seventh Avenue
Olympia, Washington 98504

Cite as: **AGLO 1976 No. 39**

Dear Sir:

By letter previously acknowledged you have requested our opinion on several questions relating to implementation of the average 5% salary increase provided by the legislature in chapter 133, Laws of 1975-76, 2nd Ex. Sess., for faculty and exempt employees of four-year higher educational institutions and the community college system. See, specifically, § 6(3) of chapter 133, supra, which reads as follows:

> "(3) Not more than $9,777,624 of general fund moneys shall be expended to provide effective July 1, 1976, an average 5% salary increase for faculty and exempt employees of the four year units of higher education and the community college system: PROVIDED, That no community college district or four year unit of higher education may grant from any fund source any additional salary increase greater than that authorized in this 1976 amendatory act." (Emphasis supplied.)

Your questions regarding this provision of the 1976 supplemental budget are as follows:

1. If a community college district's share of the salary increase fund is insufficient to pay an average increase of 5% to all eligible faculty and exempt employees:

> (a) may it use other legally available funds for the purpose of making up the difference between the amount

available and the amount necessary to pay an average 5% salary increase?

(b) is that district obliged to pay the full 5% by making up the difference with other legally available funds?

2. When it would require expenditures in excess of the amount made available to a community college district from the appropriation for the average 5% salary increase, may that college district:

[[Orig. Op. Page 2]]
(a) grant salary increases to faculty and exempt employees who have been promoted to positions involving greater responsibilities?

(b) grant longevity increments to eligible faculty and exempt employees who qualify under terms of its duly negotiated salary schedule?

(c) grant educational advancement increments to faculty and exempt employees who qualify under terms of its duly negotiated salary schedule?

3. Is there a legal distinction between the term "promotion" as it is used in question 2(a) above and the application of the term to the circumstances described in question 2(c) above?

4. Is there a legal distinction between the term "promotion" as it is used in question 2(a) above and the application of the term to a circumstance wherein a faculty member or exempt employee received a salary increase as a result of being advanced to a higher pay range because of a finding by the appointing authority that the individual had performed meritorious service?

We answer question 1(a) in the affirmative, 1(b) in the negative, and except as qualified in our analysis, question 2(a) in the affirmative and questions 2(b) and (c) in the negative. Questions 3 and 4 are answered as set forth in our analysis.

ANALYSIS

In posing the above questions you have advised us that:

"The typical method of salary administration for most community college faculty and exempt employees functions through the use of matrix salary schedules that provide eligible employees (1) longevity increments, and (2) educational advancement increments awarded for completion of additional advanced study. In some cases, merit increases are possible."

You have then gone on to express the general thrust of your

questions in the following manner:

> "Recognizing that college district boards of trustees have the statutory right to set salaries for [[Orig. Op. Page 3]] such employees1/ and the obligation to negotiate such matters with recognized bargaining agents, we are seeking an answer to the general question of whether all salary adjustments must be paid from funds appropriated by the Legislature under the 5% increase provision or whether some adjustments may or must be paid in addition to the 5% increase appropriation."

In order to place your inquiry in prospective we should, at the outset, briefly examine certain matters which predated the enactment of the 1976 supplemental budget, chapter 133, supra. During the final months of the 1973-75 biennium the legislature also authorized a salary increase for community college faculty and employees. That increase, which was effective March 1, 1975, was provided for by a supplemental appropriation in § 2, chapter 9, Laws of 1975, that read in pertinent part as follows:

> ". . . for faculty and exempt employees . . . an average salary increase of twelve percent: PROVIDED, That the twelve percent average salary increase shall include both incremental increases and general salary increases granted previously within the individual institution in fiscal year 1975. . . ."

[[Orig. Op. Page 4]]
We note that the increase authorized by that earlier appropriation provided, as does the 1976 version, for an "average increase" - in contrast to a twelve percent increase for each employee. However, while the 1976 appropriation makes no reference to incremental increases the 1975 act, supra, specifically declared that incremental increases were included within the average twelve percent salary increase which it provided for.

Then, in June of 1975, the legislature enacted the appropriation for the current (1975-77) biennium and provided funds to continue the salary increases which had been authorized by the 1975 supplemental appropriation, supra. This biennial appropriation act, chapter 269, Laws of 1975, 1st Ex. Sess., provided in § 11(8) for the:

> ". . . continuation during 1975-77 biennium of the salary increases which were granted effective March 1, 1975 pursuant to section 2, chapter 9, Laws of 1975 . . . Such salary increase funds include increments, or their equivalent, that may be granted by the individual institutions of higher education."

In AGLO 1975 No. 68 [[to John C. Mundt, Director, State Board for Community College Education an Informal Opinion, AIR-75568]], copy enclosed, we said, with reference to this latter appropriation:

"As will thus be seen, the item in question is a subsection of a special appropriation to the governor in the amount of $159,691,470. This specific subsection allocates $117,016,320 from that larger appropriation to be used solely for the continuation of the salary increases previously granted by the legislature by § 2, chapter 9, Laws of 1975, to the several listed categories of state employees.

"The restrictive language 'not more than,' however, as it appears in subsection (8), is not a limitation on the entire amount of general fund moneys appropriated by chapter 269, supra, but rather it is simply a limitation on the amount of money from the underlying $159,691,470 appropriation made by § 11, proper, which can be used for continuation of the earlier granted salary increases. Thus, in essence, this subsection merely means that not more than $117,016,320 in general fund moneys from the larger appropriation to the governor may be expended for continuation during the 1975-77 biennium of the salary increases which were granted effective March 1, 1975."

[[Orig. Op. Page 5]]

After reviewing various other portions of the appropriations act (chapter 269, supra) as well, we then informed you that, in our opinion:

". . . nothing contained in . . . § 11(8), supra, or any other legislative enactment of which we are aware purports to bar a community college from doing either of the following two things:

"(1) Using other appropriated funds or nonappropriated local funds which are legally available for the payment of salaries to fund a full continuation of the above described earlier granted salary increases if the funds allocated to the college from the appropriation made by § 11(8) of chapter 269, are insufficient; or

"(2) Using either such local funds or any appropriated funds which are legally available for the payment of salaries to provide additional pay increases for its faculty and exempt staff employees in accordance with RCW 28B.50.140(3), supra - over and above the salary increases which were previously granted to those employees in response to § 2, chapter 9, supra."

It seems apparent that the recent legislative session which enacted § 6(3), chapter 133, Laws of 1975-76, 2nd Ex. Sess., had this attorney general's ruling in mind when it passed that provision. While § 6(3) begins with limiting language similar to that contained in the 1975 enactment which was the subject of our opinion, it then goes on, in a proviso, to declare that:

". . . no community college district or four year unit of higher education may grant from any fund source any additional salary increase greater than that authorized

in this 1976 amendatory act."

Before turning to your specific questions we should dispose of two other preliminary points. First, it is true that ordinarily an appropriation act is simply an authorization to expend funds in accordance with Article VIII, § 4 of our state constitution;2/ i.e., authority from the legislature, given at [[Orig. Op. Page 6]] the proper time and in legal form, to the proper officer, to supply sums of money from the treasury in order to meet specified objects or demands against the state. See, State ex rel. Pub. Co. v. Lindsley, 3 Wash. 125, 27 Pac. 1019 (1891). Thus, a pure appropriation act cannot contain extrensic substantive legislation because Article II, § 19 of our state constitution provides

"No bill shall embrace more than one subject, and that shall be expressed in the title."

See, e.g., our letter opinion to Senator Frank Atwood dated April 2, 1971, copy enclosed.

In the present instance, however, the legislature appear to have avoided this constitutional problem by giving the act here in question a broader title than that of "AN ACT Adopting the budget; . . ." - the usual title to a pure appropriation act.3/ The title to chapter 133, supra, instead, reads in material part as follows:

"AN ACT Relating to expenditures of state agencies and offices of the state: . . ."

This title, in our judgment, is sufficiently broad to encompass § 6(3), chapter 133, supra, in its entirety.

Secondly, as also explained in our 1971 opinion to Senator Atwood, supra, legislation designed to limit salaries of public employees may not constitutionally impair existing contractual obligations. Accord, Wash. Const., Article I, § 23.4/ Thus, to the extent that a given employee otherwise covered by § 6(3), chapter 133, supra, is currently employed pursuant to a legally authorized and enforceable contract requiring the payment of additional salary increments in excess of those provided for by that subsection, the proviso therein will be unenforceable - although the source of payment will have to be something other than the $9,777,624 appropriation in the preceding sentence of the subsection. See, again, Article VIII, § 4, supra. Furthermore, if the only "contract" involved is a collective agreement entered into under chapter 28B.52 RCW (the community college professional negotiations act), this constitutional impairment argument will be foreclosed by the recent amendment to that [[Orig. Op. Page 7]] chapter contained in the following provisions of § 4, chapter 205, Laws of 1973, Ex. Sess. (now codified as RCW 28B.52.035):

"At the conclusion of any negotiation processes as provided for in section 2 of this 1973 amendatory act, any matter upon which the parties have reached agreement shall be reduced to writing and acted upon in a regular

> or special meeting of the boards of trustees, and become part of the official proceedings of said board meeting. The length of terms within any such agreement shall be for not more than three fiscal years. These agreements will not be binding upon future actions of the legislature." (Emphasis supplied.)

Question (1):

Repeated for ease of reference, your first question asks:

If a community college district's share of the salary increase fund is insufficient to pay an average increase of 5% to all eligible faculty and exempt employees:

> (a) may it use other legally available funds for the purpose of making up the difference between the amount available and the amount necessary to pay an average 5% salary increase?
>
> (b) is that district obliged to pay the full 5% by making up the difference with other legally available funds?

The clearly expressed object of § 6(3), chapter 133, supra,5/ is to provide $9,777,624 in state funds to implement [[Orig. Op. Page 8]] an average salary increase which, in the aggregate for all of the employees covered by its provisions, is not to exceed 5%. As indicated in AGLO 1975 No. 68, supra, however, the community college districts of our state are not completely dependent upon appropriated state funds to finance their operations. The proviso in § 6(3) is a legislative recognition of the fact that community college districts (as well as the four year state colleges and universities) have, to varying degrees, other sources of funding available for their operations. The proviso does not flatly prohibit such institutions from using other fund sources for salary increases. To reach a contrary conclusion would be to ignore the phrase ". . . greater than that authorized in the 1976 amendatory act" and it is, of course, a well-established maxim of statutory construction that a statute must be read to give effect to all of the language included therein and not render any such language superfluous. See, State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 488 P.2d 255 (1971); Jordan v. O'Brien, 79 Wn.2d 406, 486 P.2d 290 (1971); and State v. Jestes, 75 Wn.2d 47, 448 P.2d 917 (1968).

The language of § 6(3), supra, further reflects a recognition of the historical pattern, referred to in AGLO 1975 No. 68, of the legislature providing for salary increases but not appropriating sufficient funds to pay them in full. We therefore conclude in answer to your question 1(a), that a community college district can utilize funds from other sources, when the distribution of funds from the $9,777,624 appropriation is inadequate, to implement salary increases within the 5% level authorized - provided that the district has funds available which can legally be expended for salaries. Accord, the reasoning of our prior opinion to that extent.

In responding to question 1(b), reference must again be made to the specific language of § 6(3) as quoted on page 1, above. By this provision the legislature has appropriated funds which "shall be expended" to provide an average 5% salary increase. An appropriation act is normally construed as authorization granted by the legislature to permit the expenditure of funds not to exceed a stated sum - as contrasted with a mandate to expend all of the appropriated funds. The only language in this enactment which is expressed in mandatory terminology (i.e., "shall") is that which directs the money to be expended to provide the salary increase. But even if this language was given mandatory effect6/ it would only require that the full $9,777,624 be expended for salary increases. It would not, in addition, create an obligation on the part of a community [[Orig. Op. Page 9]] college district (or other higher educational institution) to use other funds to effectuate an average 5% salary increase if the funds made available by the 1976 supplemental appropriation are not sufficient to achieve that purpose.

Question (2):

Your next question asks:

When it would require expenditures in excess of the amount made available to a community college district from the appropriation for the average 5% salary increase, may that college district:

(a) grant salary increases to faculty and exempt employees who have been promoted to positions involving greater responsibilities?

(b) grant longevity increments to eligible faculty and exempt employees who qualify under terms of its duly negotiated salary schedule?

(c) grant educational advancement increments to faculty and exempt employees who qualify under terms of its duly negotiated salary schedule?

It is quite clear that funds appropriated by § 6(3), chapter 133, supra, cannot be used to pay the costs of any salary increases above or beyond the average 5% salary increase for which they have been appropriated. Accord, Wash. Const., Article VIII, § 4, supra. Therefore, any additional salary increase, if implemented, would have to be funded from some other source. Yet unlike the situation which existed under the 1975 salary increase appropriation in chapter 269, supra, the legislature has here specifically declared that except as authorized by § 6(3), ". . . no community college district or four year unit of higher education may grant from any fund source any additional salary increase . . ."

Except as rendered constitutionally unenforceable in a given case under Article I, § 23 of the constitution, supra (previously discussed at p. 6), it appears to us that this limiting proviso means precisely what it says. But as we above indicated the

average 5% salary increase does not mean a 5% increase for each and every employee; rather it means that salary increases in total shall not exceed 5% of the total base salaries of all employees covered by the appropriation. Thus, if an employee is promoted to another existing position which is vacated by another incumbent there will in most situations be no problem presented. For example, if a position currently has [[Orig. Op. Page 10]] attached to it a salary of $1,500 per month and, upon being vacated by its incumbent, is filled by the promotion of an employee previously making $1,200 per month, the promoted employee could receive the full $1,500 (i.e., a $300 personal increase) and in the aggregate salary structure there would be no impact upon the 5% because there would be no increase in the total payroll.

There are, however, two situations in which promotions may present problems under the appropriation involved in your question: First, when the person being promoted assumes his new position at a higher salary than was paid to the prior incumbent; and second, when the promotion is made to a newly created position which did not previously exist. We will discuss these situations separately.

We believe in the first situation, when an individual is promoted to a position to fill a vacancy, any increase in compensation in excess of that paid to the prior holder of the position will in fact be a salary increase within the meaning of the appropriation act. This conclusion is based on the fact that the limitation is upon the aggregate increase in compensation for positions covered by the appropriation. Since a promotion to an existing position clearly involves a position which is covered by the appropriation it would appear that any increase granted (irrespective of who the incumbent is) above the level existing as of the time of the increase would be an increase within the meaning of the act.

In the second situation (i.e., the creation of a new position to which an individual is promoted) we conclude that the salary established for the position and paid to its initial incumbent will not constitute an "increase" within the meaning of the act. Obviously if a bona fide new position is created the salary for the position did not exist within the base upon which the 5% increase is to be computed. The same situation exists for new positions that did not previously exist which are filled by individuals who are promoted as for those filled by persons who are hired from outside the system. Such new positions obviously are not included within the base as computed by the legislature. The only alternative would be to consider the entire cost of the new position as "an increase" which would result in any significant increase in staffing virtually eliminating any increases for the existing staff. We do not believe the legislature intended that result.

Therefore, it is our opinion that if a community college employee is promoted to a position which is, in fact, a new position carrying more significant duties and involving greater responsibilities the pay established for that position need not be included within the 5% limitation. We would emphasize, however, that the employee's transfer to the new position must in [[Orig. Op. Page 11]] fact be a bona fide promotion and not simply a subterfure to try to avoid the legislative limitation upon salary increases.

By analogy, we would refer to cases arising under Article XI, § 8 of our constitution insofar as it contains a prohibition against increases in compensation during a term of office. For example, in State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428 (1893), the court permitted an increase in compensation for a county treasurer because of legislation which required the county treasurer to assess and collect city taxes. The court found that these were new duties which were entirely outside of his former duties and thus permitted an increase in compensation. In contrast, in State ex rel. Funke v. Bd. of Commissioners, 48 Wash. 461, 93 Pac. 920 (1908), the court found that the changing of a job title and adding some incidental duties was not sufficient to justify an increase in compensation during term. Further, in State ex rel. Livingston v. Ayer, 23 Wn.2d 578, 161 P.2d 429 (1945), the court found the attempt to increase the salary of certain designated county officers was clearly an attempt to evade the constitutional prohibition against increases during term and that the slight change in duties was not sufficient to justify such an increase.

We note these decisions simply by way of analogy to indicate that if a new position is created it must be a bona fide position and the filling of the same by promotion must entail the addition of new duties and responsibilities in excess of those previously performed by the individual involved.

The remaining two segments of your second question essentially inquire as to whether longevity and educational pay increments can be excluded from the pay raises which are subject to the average 5% limit. In the community college system the compensation for most of the employees covered by this limit is established by annual contracts. In negotiating such contracts, elements such as increment increases and increases related to educational attainments are normally included. As we have previously indicated in this opinion, both the salary adjustment earlier provided by the legislature in March of 1975, and the continuation of that increase for the current biennium specifically defined salary increases to include increments. Thus the legislature there made it clear that the 12% salary increases then involved were not in addition to increments which had previously been contracted for with the respective districts. We have further noted that the 1976 appropriation section does not correspondingly define the term "increase" either expressly to include or exclude increment increases. Nevertheless we conclude that such increases must be included within the limits [[Orig. Op. Page 12]] of the 1976 act by implication for, as we have seen, the 1975 act also differed from the 1976 version in that the former did not prohibit the local districts from granting increases in excess of those provided by the legislative appropriation. In the 1976 enactment the legislature has not only supplied funds for an average 5% increase but has specifically prohibited the granting of any further increases from other funds by the community college districts. If this prohibition were read to exclude discretionary increases (i.e., the annual contracting provisions by the districts re base salaries, increment increases, educational adjustments, etc.), then the prohibition would be meaningless. Since we are mandated to give meaning to legislative provisions the prohibition, therefore, must be construed to include incremental increases either on the basis of longevity or educational attainments.

Questions (3) and (4):

Finally you have asked:

3. Is there a legal distinction between the term "promotion" as it is used in question 2(a) above and the application of the term to the circumstances described in question 2(c) above?

4. Is there a legal distinction between the term "promotion" as it is used in question 2(a) above and the application of the term to a circumstance wherein a faculty member or exempt employee received a salary increase as a result of being advanced to a higher pay range because of a finding by the appointing authority that the individual had performed meritorious service?

We assume that your purpose in asking these two questions is to obtain, if possible, a broadening of the scope of our affirmative answer to question 2(a) so as to justify additional salary increases, over and above those covered by § 6(3), chapter 133, supra, to faculty members or other community college exempt employees7/ who, although remaining in the same positions, have either undergone some form of "educational advancement" or have performed meritorious services.

We do not, however, believe that the rationale which we applied in answering question 2(a), can be extended to [[Orig. Op. Page 13]] cover these two alternative situations. In short, there is in our opinion a legal distinction between the term "promotion," as it is used in question 2(a), and either of the two concepts referred to in your second and third questions.

We trust that the foregoing will be of assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

EDWARD B. MACKIE
Deputy Attorney General

RICHARD M. MONTECUCCO
Assistant Attorney General

*** FOOTNOTES ***

1/See, RCW 28B.50.140(3) which provides that:

"Each community college board of trustees:

". . .

> "(3) Shall employ for a period to be fixed by the board a college president for each community college, a director for each vocational-technical institute or school operated by a community college, a district president, if deemed necessary by the board, in the event there is more than one college and/or separated institute or school located in the district, members of the faculty and such other administrative officers and other employees as may be necessary or appropriate and fix their salaries and duties;"

2/"No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; . . ."

3/See, e.g., the title to chapter 269, Laws of 1975, 1st Ex. Sess., supra.

4/"No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."

5/Also repeated for ease of reference as follows:

> "(3) Not more than $9,777,624 of general fund moneys shall be expended to provide effective July 1, 1976, an average 5% salary increase for faculty and exempt employees of the four year units of higher education and the community college system: PROVIDED, That no community college district or four year unit of higher education may grant from any fund source any additional salary increase greater than that authorized in this 1976 amendatory act." (Emphasis supplied.)

6/See, Island Cy. Comm. v. Dep't of Revenue, 81 Wn.2d 193, 204, 500 P.2d 576 (1972).

7/I.e., except from the classified service provided for under the higher education personnel act, chapter 28B.16 RCW.