LETTER OPINION
2003-L-49

November 7, 2003

The Honorable Ray Holmberg
State Senate
621 High Plains Court
Grand Forks, ND 58201-7717

The Honorable Ken Svedjan
House of Representatives
4697 Harvest Circle
Grand Forks, ND 58201-7946

Dear Senator Holmberg and Representative Svedjan:

Thank you for your letter asking whether a proposal by the Office of Management and Budget (OMB) and several state agencies to grant one percent employee pay raises January 1, 2004, complies with the requirements of 2003 Senate Bill 2423. You indicate these agencies are not pooling funds, but are providing raises only for their own employees.

Senate Bill 2423 was passed in the Special Session of the 58th Legislative Assembly and became effective July 1, 2003. See 2003 N.D. Sess. Laws ch. 669. Section 1 of the bill targets reductions in the number of state employees in the executive branch and judicial branch agencies. Id. Section 2 requires the OMB to establish a state employee compensation pool[1] for executive branch agencies from savings resulting from the employee reductions under section 1. Id.

The bill further provides that executive branch agencies "may provide state employee salary increases effective January 1, 2004, to be paid in February 2004 of up to one

[1] OMB actually developed several employee compensation pools. See Memo from Director of OMB to Agency Directors (June 20, 2003). However, Senate Bill 2423 only authorized the operation of a single pool for executive branch agencies. 2003 N.D. Sess. Laws ch. 669, § 2. While there is a rule of statutory construction that words used in the singular include the plural, that rule does not apply where, as here, a contrary intention plainly appears. N.D.C.C. § 1-01-35.

percent from pooled savings" and "if necessary, from other accumulated savings." Id. at Section 3. (Emphasis supplied.) "At least seventy percent of the funding for the increases must be from pooled savings." Id.

"The primary goal in construing the meaning of a statute is to discover the intent of the Legislature." Northern X-Ray Company, Inc. v. Hanson, 542 N.W.2d 733, 735 (N.D. 1996). In seeking to determine legislative intent, courts will look first to the language of the statute. Id. "If a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute. Id." N.D.A.G. 2003-L-33. "Unless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning." Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). On the other hand, "[i]f the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute." Id.; N.D.C.C. § 1-02-39. "[L]egislative history may be used to determine legislative intent if the meaning of the statute is ambiguous or unclear." N.D.A.G. 95-L-53.

Two pertinent questions arise regarding employee raises under Senate Bill 2423. First, are employee raises permissible if the targeted position reductions are not met. Second, does Senate Bill 2423 permit the proposed raises to be granted only to employees of those agencies actually generating the savings through job elimination. It is unclear from the text of Senate Bill 2423 whether the targeted position reduction must be achieved for any raises to occur. Consequently, it is appropriate to utilize legislative history to answer the first question.

In explaining the difference between Senate Bill 2423 and the predecessor bill which had been vetoed by the Governor, Representative Berg, a primary sponsor of Senate Bill 2423 explained:

> [T]hat is another significant difference here. In the original language said there were two things that had to happen. That number was 84 positions eliminated and the salary increases would be up to a one or a two. This bill still has those targeted reductions but if that number is not achieved, the dollars that would be saved could be used for salary increases. . . . REPRESENTATIVE SKARPOL asked if what he was saying is if there is an employee reduction of one, whatever salary that individual had would be split up? If there is no employee reduction there will be no salary raise? REPRESENTATIVE BERG answered yes to both questions.

Hearing on S.B. 2423 Before the Joint Senate and House Appropriations Committee, 2003 N.D. Leg. Special Session (May 5) (Statements of Rep. Berg and Rep. Skarpol).

Based on this legislative history, it is my opinion that salary increases are permissible under Senate Bill 2423 even if the targeted position reductions are not achieved.

The second question is whether raises may be given only to employees in agencies generating savings. Senate Bill 2423, requires OMB to establish a state employee compensation pool for executive branch agencies. Those agencies may provide employee salary increases effective January 1, 2004, of up to one percent from pooled savings and other accumulated savings. The ordinary, commonly-understood meaning of the word "pool" is a "grouping of resources for the common advantage of the participants"; or as an "association of individuals or entities who share resources and funds to promote their joint undertaking." The American Heritage Dictionary 964 (2d coll. ed. 1991); Black's Law Dictionary 1180 (7th ed. 1999). Similarly, the word pooled is defined as "[t]o put into a common fund for use by all." The American Heritage Dictionary 964 (2d coll. ed. 1991). Thus, Senate Bill 2423 requires OMB to establish a state employee compensation pool for the common advantage of the executive branch agencies. If those agencies wish to use the authority of that bill to grant one percent salary increases in January 2004, the raises must be from this pooled savings or common fund. 2003 N.D. Sess. Laws ch. 669, §§ 2 and 3.

Based on a plain reading of Senate Bill 2423, state employee salary increases under the authority of this bill may only be granted from the executive branch employee compensation pool and other authorized savings. At least 70% of any raises must be from the compensation pool. Nowhere in the text of Senate Bill 2423 is there authority to create additional executive branch pools or to only grant raises to employees of only those agencies actually generating saving through elimination of positions.

Even if it were argued that Senate Bill 2423 is ambiguous or of doubtful meaning as to this question so that extrinsic aids could be used to interpret it, this conclusion would be the same. In addition to the legislative history quoted above, this aspect of Senate Bill 2423 was discussed at a Senate Appropriations Committee hearing on May 5, 2003:

> SENATOR MATHERN asked [Senator Holmberg] if it is his understanding that this pool savings could be accumulated across executive branch and distributed across the executive branch or would it be agency by agency? CHAIRMAN HOLMBERG stated it is his understanding it would be across the executive branch because OMB can prepare or set up this pool[2] . . . SENATOR MATHERN stated that one agency could receive increases even though they had no decreases in staff because another agency had decreases in staff. CHAIRMAN HOLMBERG agreed that was his

[2] There was also some language in this testimony indicating that OMB was not required to set up a pool. However, the bill was subsequently amended making creation of the pool mandatory by changing "may" to "shall" on p. 1, line 22. See Hearing on Senate Bill 2423 Before the Senate Appropriations Committee, 2003 N.D. Leg. Special Session (May 6).

> understanding and some agencies are so small, there is no way that they could continue their functions with that type of rollup.

Hearing on Senate Bill 2423 before the Senate Appropriations Committee, 2003 N.D. Leg. Special Session (May 5) (Discussion between Sen. Holmberg and Sen. Mathern).

Thus, the legislative history also indicates that to the extent savings from employee reductions occurred, those moneys were to be accumulated in the executive branch pool and distributed across the executive branch. The savings realized would be utilized for all employees, including those in small agencies which could not absorb job cuts, not just agencies generating the reductions.

Having said this, I recognize that not all dollars saved from job reductions are derived from easily transferable general fund monies. Federal funds as well as certain state special funds involved may be subject to statutory or other legal restrictions on their use.[3] Consequently, savings generated from eliminating positions funded from legally restricted federal or special funds may not be transferred to another agency for salary increases in violation of the restrictions on their use.

The Legislature also recognized this problem. At a hearing on May 6, 2003, on Senate Bill 2423, the Assistant Legislative Budget Analyst and Auditor testified that "OMB would be responsible for establishing the pool and it would need to set up the guidelines with how those various funding sources would be allocated back out. It would be basically up to the OMB to [comply with] any federal requirements that would be associated with those funds. . . . OMB would set up the guidelines to how those funds would be designated once they were included in the pool and allocated back out." Hearing on S.B. 2423 Before the Senate Appropriations Committee, 2003 N.D. Leg. Special Session (May 5) (Testimony of Allen Knudson). Senate Holmberg stated "it is up to OMB to allocate the money back out. . . they would have to comply with all federal laws and regulations." Id. (Statement of Sen. Holmberg).

Thus, I believe that the Legislature intended to give OMB sufficient leeway to ensure that in implementing the provisions of Senate Bill 2423, state agencies would not violate any legal restrictions on the use of federal or other special funds.

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[3] It is beyond the scope of this opinion to analyze the particular restrictions on federal or other special funds that may be involved in funding positions which may be eliminated. See N.D.A.G. Letter to Hanson (May 31, 1990) ("Because the question of whether moneys in a particular fund are public moneys or moneys held in trust depends upon the terms and conditions by which the moneys are held, it is not possible to issue a single opinion that would apply to all special funds.")

Based on the foregoing, it is my opinion that Senate Bill 2423 does not authorize pay raises to be granted only to employees of those agencies actually generating savings through job elimination; employees of any agency in the executive branch pool are equally eligible for a raise from any money legally available in the pool for that purpose.[4] It is my further opinion that any savings derived from elimination of positions funded by federal or special funds which are subject to legal restrictions on use must be allocated back to the affected agency and may then be used for employee raises by that agency under Senate Bill 2423 if 1) employees from other executive branch agencies are potentially eligible for raises from the pool, 2) the raises from federal or special funds do not exceed the limits contained in Senate Bill 2423, and 3) that use of such federal or special funds for pay raises does not otherwise violate federal or state law or the conditions under which the funds were granted.

Sincerely,

Wayne Stenehjem
Attorney General

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[4] Of course, the amount of money available for across the board raises may be insufficient to make such raises practicable or worthwhile.