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February 3, 1989

Honorable Rod Beck
Idaho State Senate
Statehouse Mail

Honorable Brent Brocksome
Idaho State House of Representatives
Statehouse Mail

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Senator Beck and Representative Brocksome:

Your letter of December 6, 1988, asks our opinion as to the appropriateness of action recently taken by Governor Andrus directing his agency department directors "to implement a minimum state employee wage schedule." Specifically, you ask us to review two questions:

1. Does the Governor have statutory or other legal authority to mandate such an increase and change in the current system; and
2. Is this increase a violation of the existing statutes and/or the authorized pay plan commonly called the Hay System?

We treat the two questions as one. If the Governor's action violates existing statutes, then he has no legal authority to take that action.

At the outset, it is well to state what is at issue. The Governor's action of November 25, 1988, as noted in your letter, took the form of a "memorandum" to his agency department directors. It was not a formal executive order, as reported in some quarters.

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Second, the memorandum does not disrupt the normal hiring or pay scale process. State employees will still be hired at step A in the proper Hay Plan pay grade for their job classification. Only after probation is completed does the Governor's directive come into play. At that time, he instructs the agency heads to move those who successfully complete probation to \$5.39 per hour, the federal poverty level for a family of four. The directive will not result in any employee being paid above the maximum step in the assigned pay grade.

The affected pay grades are numbers 17, 18 and 19 in the state personnel system. Employees in pay grade 17 will receive a 15% increase upon successful completion of probation. At present, there are 43 employees in pay grade 17, occupying such positions as human services aide, motor vehicle operator I, language lab assistant, kitchen helper and office clerk.

Employees in pay grade 18 will receive a 10% increase upon successful completion of probation. At present, there are 19 employees in that pay grade, occupying the positions of canteen worker and homemaker.

Employees in pay grade 19 are not affected by the Governor's directive because their six-month pay increase, after successful completion of probation, would bring them to \$5.39 in any case.

The statute controlling wage increases is Idaho Code § 67-5309C, which reads in pertinent part:

It is hereby declared to be the intent of the legislature that the advancement of an employee to steps providing an increased salary within each pay grade shall be based solely on merit, including factors such as increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position.

The "solely on merit" language of this statute could be read to require that a high standard of performance be reached before granting a pay increase and as precluding an across-the-board increase of the kind directed in the Governor's memo. In practice, since 1976, agencies have uniformly granted at least a 5% increase to all employees who successfully complete their probationary period. The long-standing practice of an administrative agency in carrying out its statutory duties is entitled to deference and, when long acquiesced in by the legislature, is generally held to be persuasive in interpreting a statute's mandate. Davis, Administration Law Treatise, § 29.13 (1984). Thus, it is our conclusion that a post-probation increase of the magnitude mentioned in the

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Governor's memorandum would not violate the "merit" pay system outlined in Idaho Code § 67-5309C.

The precise implementation of the increase is more problematic. The Governor's memorandum directs agency heads to identify all permanent classified employees who are below \$5.39/hour and prepare an EIS-3 advancing them to at least \$5.39/hour, effective December 11, 1988. This advance, according to the Governor's memorandum, will not require a performance evaluation. This precise mechanism for implementing the merit increase is not contemplated in the statute or rules. The controlling statute, once again, is Idaho Code § 67-5309C, which states:

No employee shall advance to a higher step within a pay grade without an affirmative certification for such purpose by the employee's immediate supervisor, approved by the department director or the director's designee, . . .

The Personnel Commission's implementing regulations state that "Performance evaluations shall be . . . used as the affirmative certification for merit increases (ref. Section 67-5309C(c), Idaho Code); . . ." IDAPA 28.21.A.3. Thus, it is clear that the performance evaluation cannot be dispensed with before advancing the employee to the \$5.39 step of the pay grade in question.

While we have not conducted a detailed investigation of the employees involved, we are informed by the Personnel Commission that the individual agencies are carrying out the Governor's directive properly.

The Personnel Commission rules leave to individual agencies the discretion to define the general terms "increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position." It would not be unreasonable for an agency to adopt the policy that these goals would be negated if the state employee were forced to draw welfare to meet the federal poverty level. Furthermore, a move to \$5.39 per hour would help close the gap on the lower salary line and bring classes closer to the pay line established by Personnel Commission studies. That pay line is currently \$5.42 per hour at 100 points in the Hay System (approximately pay grade 17).

To carry out the Governor's directive within the confines of existing statutes and rules, agencies would simply need to modify the "salary administration policies" they are required to "adopt and file with the Personnel Commission" pursuant to IDAPA 28.07.G.1. That modification might take the form of a

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policy stating that "completion of the probationary period will result in approximately a 5% increase or \$5.39, whichever is less."

It is our conclusion, therefore, that while the Governor's memorandum did not correctly identify the precise mechanism for implementing his directive, that directive can be carried out by agencies without violating existing statutes, rules or regulations.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Very truly yours,



PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK/mkf