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PUBLIC OFFICES AND OFFICERS: Tenure and wages of exempt employees

STATE: Exempt employees, unclassified employees

LEGISLATURE: Authority over exempt employees

EXEMPT EMPLOYEES: Authority of the legislature over matters of tenure and wages.

The state legislature has complete authority over the wages of exempt employees but may not interfere with matters of hire, tenure and discharge.

Opinion No. 4783 July 19, 1973.

Honorable David S. Holmes, Jr.
State Representative
The Capitol
Lansing, Michigan

Honorable Daisy Elliott
State Representative
The Capitol
Lansing, Michigan

In your letter of April 25, 1973, you ask several questions which may be rephrased as follows:

1. Do public employees who are exempt from the State classified civil service presently have a right to a hearing in matters involving discipline or discharge?

2. What is the authority of the legislature with respect to the wages, hire, tenure and discharge of State employees exempt from the classified civil service?

In answer to your first question, a review of relevant statutory and constitutional provisions reveals that exempt employees do not ordinarily have a right to a hearing in matters involving discipline or discharge. One of the primary achievements of civil service reform has been the creation of tenured positions for public employees from which they may only be removed upon a finding of cause. It has been felt, that the proper formulation of policy requires that the Governor and the heads of principal departments have available to them at least a minimum number of appointive positions which may be filled by persons who will hold office at the will of the appointing authority. See Const 1963, art 5, § 3 and art 11, § 5. This has been the nature of an "exempt" position. It is one in which the incumbent serves at the pleasure of the appointing authority and may be removed for any reason without any right to a hearing.

The second question which your letter raises is that of the authority of the legislature with respect to the wages, hire, tenure and discharge of State employees exempt from the classified civil service. This question must be approached with the initial recognition that the Michigan Legislature possesses complete and total legislative power except to the extent that such authority has been specifically limited by the constitution. *Oakland County Taxpayers' League* v *Oakland County Supervisors,* 355 Mich 305, 94 NW2d 875 (1959); *Romano* v *Auditor General,* 323 Mich 533, 35 NW2d 701 (1949); *Bradley* v *Milliken,* 433 F2d 897 (CA 6, 1970). This principle was articulated as follows in the *Oakland County Taxpayers'*

League case cited above:

> "In the early case of *Attorney General* v. *Preston* (January, 1885), 56 Mich 177, this Court established that the legislative power of the people through their agent, the legislature, is limited only by the Constitution, which is not a grant of power, but a limitation on the exercise of power; and, secondly, that this Court will not declare a statute unconstitutional unless it is plain that it violates some provisions of the Constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter." (355 Mich 305, *supra,* at page 323)

Applying these principles to the matter at hand, it is clear that there are no restrictions, constitutional or otherwise on the plenary authority of the legislature to fix the wages of exempt employees at whatever level it deems appropiate.

This impression is confirmed by Const 1963, art 11, § 5 which states that:

> "The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service."

Thus, in answer to the first portion of your second question, it is my opinion that the legislature has complete authority over the wages of exempt employees. The wages of exempt employees are and have been fixed by law as part of the general budgetary and appropriation process and this procedure is entirely constitutionally appropiate.

A distinct question is presented, however, by the problem of whether or not the legislature may create restrictions relating to the hire, tenure and discharge of exempt employees. Const 1963, art 11, § 5 provides as follows:

> ". . . The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department."

The provision does not answer clearly the question of whether the term "exempt" and the exception of certain positions from civil service should be taken as denying the legislature the right to create tenure restrictions for such positions or as merely removing such positions from the constitutional state civil service leaving the legislature free to devise such rules and regulations as it may see fit. In the absence of cases interpreting the Constitution in regard to this question, we may turn for guidance to

the debates of the Constitutional Convention. *Burdick* v *Secretary of State,* 373 Mich 578, 130 NW2d (1964).

A discussion of the report of the committee on the executive branch which took place between Chairman Martin and other delegates affirms that it was the intention of the convention that employees holding exempt positions outside the civil service should remain nontenured, "political" appointees. Portions of the debate relating to this point follow.

"CHAIRMAN DEVRIES: Mr. King.

"MR KING: Mr. Chairman and fellow delegates, as a member of the committee on executive branch and as a member of the subcommittee which worked on this particular problem, the subcommittee concerning civil service, I would like to respond to the remarks by Senator Hutchinson by pointing out that it is my understanding as a member of this subcommittee that the first sentence on page 314 expresses the position of the committee, and that is, "This language will permanently prevent such classification and reserve these positions for political appointment without tenure.' . . . I want to make it very clear that I don't want the legislature or anyone else to interfere with these 2 exempt positions along with the head of the department or the executive director of the board or commission. . . .

"CHAIRMAN DeVRIES: Mr. Martin.

"MR. MARTIN: Mr. Chairman, I might add that by the phrasing now prepared by the committee, a board or commission could not request an executive officer be made nonexempt.

"CHAIRMAN DeVRIES: Mr. Downs.

"MR. DOWNS: Mr. Chairman and delegates, Mr. King made the comments I was going to make, so I will try to be extremely brief. I believe that in the committee report you will find that the sentence, before the one Mr. King read on page 313, says:

> "Because of an ambiguity in the constitution, the civil service commission classified the chief administrative officers of 9 boards or commissions at the request of these boards or commissions.

"And then the language that follows is that that Mr. King read to the committee. My construction of this is that the committee strengthened what I think was the original intent of the civil service amendment by the language that was added.

"I think then we get into a very basic concept of government. We did the other day readopt the principle of separation of powers. That principle provides that the legislature adopt the laws and that the governor be the chief executive officer for their administration. And I submit that to hold the governor responsible for the sound administration of government, he should have the power to make these key appointments, and that the other operation of government is properly done through a career civil service. This language, which Mr. King read, seems to me to point out very clearly that the intent is that the position that is the chief executive or administrative head, or the chief administrative officer—or the chief executive officer—as spelled out in line 7, provides that the governor would have the re-

sponsibility for making that appointment, and that that power of the governor could not be taken away by the legislative branch. Thank you."

1 Official Record, Michigan Constitutional Convention 1961, p 648

Mr. Downs' remarks represent the conclusion of the debate of this matter. Since his statements conform to the conclusion of Chairman Martin of the committee on the executive branch and to the statement of Mr. King, a member of the subcommittee on civil service, they may fairly be regarded as representing the intent of the convention on this point. This impression is confirmed by the section of the convention address to the people relating to this point which states:

"New language in the first paragraph prevents the classification of the chief executive officer of boards and commissions and reserves these positions for political appointment without tenure. Eight exempt positions among policy personnel are provided in the office of the governor. This simply gives constitutional sanction to a practice which has become customary. The revision also provides for additional exempt positions in other principal departments." 2 Official Record, Constitutional Convention 1961, p 3405

Thus, in answer to the second question stated at the outset, I see no bar to action by the legislature relating to the wages of exempt employees. The legislature is prohibited, however, by the constitutional doctrine of separation of powers from interfering with the executive branch in its control over the hire, tenure and discharge of State employees exempt from the classified civil service.

One further point needs to be mentioned. I have stated that generally exempt employees have no right to a hearing in matters of discipline and discharge since such employees serve at the pleasure of the appointing authority.

There is, however, one exception to this broad discretion. It arises out of the Fair Employment Practices Act under which:

"The opportunity to obtain employment without discrimination because of race, color, religion, national origin, sex, age or ancestry is . . . recognized as and declared to be a civil right." [1955 PA 251, § 1 as amended; MCLA 423.301; MSA 17.458(1)]

Under Section 3 of the act [MCLA 423.303; MSA 17.458(3)] it is declared to be an unfair employment practice:

"For any employer, because of the race, color, religion, national origin or ancestry of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any matter, directly or indirectly related to employment, except where based on a bona fide occupational qualification."

Under section 2 of the act [MCLA 423.302; MSA 17.458(2)] it is specified that:

"The term 'employer' includes the state or any political or civil subdivision thereof. . . ."

Thus, it is clear that if the dismissal of an exempt employee amounted to an unfair employment practice within the terms of the act above cited, such a dismissal would be subject to the investigatory and hearing procedures of the Michigan Civil Rights Commission. [MCLA 37.1 *et seq*; MSA 3.548(1) *et seq*; MCLA 37.6; MSA 3.548(6)]

These provisions of the Michigan Fair Employment Practices Act do, of course, constitute a restraint established by legislative enactment on the power of the executive branch to hire and dismiss exempt employees at will. The legislature, however, has special powers to deal with problems of discrimination granted by the equal protection section of Const 1963, art 1, § 2. This section and the convention comment relating to it are set out below:

> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."
>
> Convention Comment
>
> "This is a new section. It protects against discrimination because of religion, race, color or national origin in the employment of civil and political rights and grants equal protection of the laws to all persons. The convention record notes that 'the principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing and public accommodations.'
>
> "The legislature is directed to implement this section by appropiate legislation and the proposed constitution establishes a Civil Rights Commission in the Article on the Executive Branch." 2 Official Record, Constitutional Convention 1961, p 3363

The opportunity to obtain employment without discrimination was recognized as a civil right by the Fair Employment Practices Act, 1955 PA 251 which antedates the present Michigan Constitution. Thus, the language of the current equal protection provision must be considered to have raised this principle to the status of a constitutional right.

The Constitution of 1963, while it created no new civil rights [See *Pompey* v *General Motors Corporation*, 385 Mich 537, 559, 189 NW2d 243, 254 (1971), fn 20] did, by this section, give constitutional sanction to the pre-existing civil right of every citizen to be free from discrimination in matters of employment.

Under the Fair Employment Practices Act the State is specifically included as among the employers to which the act applies [MCLA 423.302; MSA 17.458(2)] and under the equal protection section of the Constitution no exception from its application is made in favor of the State.

Thus, I conclude that under the Fair Employment Practices Act and under the State Constitution, the State (as well as every other employer) is prohibited from engaging in discrimination against any employee, whether under civil service or exempt. The legislature remains free by virtue of the authority vested in it by the equal protection section to legislate in

the field of providing suitable remedies for all employees claiming to have been the victims of such discrimination.

FRANK J. KELLEY,
Attorney General.

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PUBLIC RECORDS: Examination by members of the public.

Records of names and compensation of public officers and employees including officers and employees of institutions of higher education, are public records subject to examination and copying by members of the public.

The custodian of public records may make and enforce reasonable rules and regulations with regard to the examining and copying of such records so as to protect the records from loss and destruction and to maintain the efficiency of his office.

In limited instances, where the public interest may require, the record of the name and compensation of a public employee be held in confidence. However, in such cases the burden of justifying confidentiality is on the custodian of the record.

Opinion No. 4794 August 7, 1973.

Hon. Loren D. Anderson
State Representative
The Capitol
Lansing, Michigan

You have asked my opinion as to whether any unit of government may withhold information of government salaries paid out of public money. You also inquired as to whether the board of control of a university may withhold from the public information relative to personnel salaries.

The fact that two questions were asked suggests that, with regard to the withholding of information about personnel salaries, the board of control of a university may have a different status than other units of government. In my opinion, this is not the case. The universities and colleges continued by Const 1963, art 8, § 5, and the colleges and universities granting baccalaureate degrees, created by law, and whose governing bodies are constitutional bodies corporate under Const 1963, art 8, § 6, are a part of the government of the State of Michigan and are public bodies. *Robinson* v *Washtenaw Circuit Judge,* 228 Mich 225, 228 (1924). *Branum* v *Board of Regents of University of Michigan,* 5 Mich App 134, 138 (1966). *Regents of University of Michigan* v *Labor Mediation Board,* 18 Mich App 485, 490 (1969). *Regents of University of Michigan* v *Michigan Employment Relations Commission,* 389 Mich 96 (1973). The board of control of a university is a public employer and its employees are public employees. *Regents of University of Michigan* v *Labor Mediation Board, supra.*

In general, records deemed to be public are specified in MCLA 399.5; MSA 15.1805. 1 OAG, 1957, No 2969, p 147 (April 2, 1957). In pertinent part, this section reads as follows: