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May 5, 2006

Opinion No. 06-083

Validity of general pay raise for all school employees except contract school bus drivers that are paid partly as subcontractors and partly as school employees

QUESTION

May a local school board give pay raises to all school employees and specifically leave out the bus drivers when giving out a general pay raise?

OPINION

Based on the applicable statutes, local school boards may give pay raises to some employees or contractors and not others, subject, however, to any applicable contract provision, collective bargaining agreement, local school board policy or state board of education policy that states otherwise. Further, pay raises may not be withheld based on any discriminatory reason prohibited by law.

ANALYSIS

Your opinion request states that "contract" school bus drivers are paid partly as subcontractors and partly as school employees. In previous years, the school bus drivers received pay raises the same as other school employees on their employee portion of their paychecks. You have not submitted any contracts or local school board policies to be reviewed with your request.

Your question requires an analysis of the legislative program known as Basic Education Program ("BEP") that provides the public funding of education for kindergarten through twelfth grade (K-12). The BEP defines the components of basic education for all public school children in Tennessee, determines the total cost of that education for each local education agency ("LEA") and fully funds the cost through a combination of state and local funds.[1]

[1]The BEP was the State's response to litigation where the Tennessee Supreme Court found the existing school funding system unconstitutional and directed the General Assembly to fashion an appropriate remedy within the constitutional parameters decided by the court. *Tennessee Small Schools v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (Small Schools I). *See also Tennessee Small Schools Systems v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) (Small Schools II), in which the Court summarizes the Education Improvement Act of 1992 ("EIA"), 1992 Tenn. Pub. Acts, ch. 535, and the BEP. *See also Tennessee Small Schools Systems v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (Small Schools III), in which the Court found the salary equity plan did not include equalization of teachers' salaries and was therefore, unconstitutional, reversing and remanding the case.

The components of a basic education are determined by the State Board of Education and regularly reviewed by a committee established by the State Board.[2] Pupil transportation is one of the components.[3]

Boards of education are authorized but not required to provide bus transportation. [4] Directors of schools, in employing school transportation personnel, and boards of education, in contracting for transportation services with persons owning equipment, are authorized to enter into contracts for such services, but such contracts are not to exceed four year terms.[5] The county board of education is authorized to adopt rules and regulations prescribing the qualifications of school bus drivers who must possess a certificate issued by the county board of education to be authorized to drive a school bus in this state.[6]

Teachers and other LEA employees receive periodic raises when the legislature funds salary increases for all state employees.[7] In years past, the EIA expressly barred local systems from using BEP funds for salary increases.[8] In 2003, the legislature amended the statute and deleted the prohibition. TENN. CODE ANN. § 49-3-306(d) now states:

> (d) Notwithstanding any other provision of law to the contrary, any board may increase the salaries of its employees at any time during the school year, upon the basis of a new or amended contract, if in so doing it does not exceed its budget as adopted or amended. For an LEA which meets class size requirements under § 49-1-104, nothing in this subdivision shall be construed to prohibit BEP funds generated in salary components for **nonlicensed personnel** to be used to increase salaries for currently employed **nonlicensed personnel** except where such funds are generated for new or additional positions. (Emphasis added).

Currently, BEP funds generated in salary components for nonlicensed personnel may be used for salary increases except where such funds are generated for new or additional positions. Bus drivers,

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[2]TENN. CODE ANN. § 49-1-302(a)(4).

[3]*Id*. *See also*, TENN. CODE ANN. § 49-3-309 and § 49-3-355. Pupil transportation is a non-classroom component of the BEP. *See* BEP Blue Book at http://www.state.tn.us/sbe/bep (click on "BEP Blue Book").

[4]TENN. CODE ANN. § 49-6-2101.

[5]TENN. CODE ANN. § 49-6-2101(e).

[6]TENN. CODE ANN. § 49-6-2107.

[7]*Small Schools II*, 894 S.W.2d at 738.

[8]*See* Op. Tenn. Atty. Gen. 96-137 (Nov. 22, 1996) and Op. Tenn. Atty. Gen. 99-130 (June 30, 1999) citing TENN. CODE ANN. § 49-3-306(5)(A)(v) that stated "Unless such funds are specifically appropriated for salary increases, no LEA shall increase salaries of existing personnel by using state funds appropriated for public education that have been allocated for new or additional positions."

generally, would fall within the category of nonlicensed personnel. "Licensed personnel" is defined in TENN. CODE ANN. § 49-3-302(10) and "means any person employed by an LEA and for whom licensure is required as a condition of employment by law." Licensed personnel includes teachers and other personnel with a teacher's license, college degree with required college course work, and other training and experience.[9] School bus drivers, generally, would fall in the "nonlicensed" personnel category and could receive salary increases pursuant to TENN. CODE ANN. § 49-3-306(d).

The local school board is authorized, among other things, to manage and control all public schools established or that may be established under its jurisdiction.[10] The director of schools is authorized to recommend salaries for teachers in accordance with the salary schedule and all other employees, and prepare a budget to be presented to the board of education.[11]

The local school board could choose to provide raises in excess of the raises provided by the legislature. TENN. CODE ANN. § 49-3-306(b)(4) provides:

> (A) Nothing in this section shall prevent any LEA from supplementing salaries from its own local funds when such funds are in addition to the local contribution of such LEA.
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> (B) When any LEA allowed any licensed personnel at the beginning of or during the preceding school term, an amount in addition to the salary which was required for such personnel under the state salary schedule in effect at the beginning of or during the preceding school term and which additional amount is paid entirely out of local funds, then the LEA shall continue to pay such additional amount out of local funds.
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> (C) The provisions of subdivision (b)(4)(B) shall not prohibit a reduction in local salary supplements pursuant to subdivision (a)(2).

In summary, pay raises are authorized by TENN. CODE ANN. § 49-3-306(d) within certain conditions. Pay raises may be given if they do not exceed the budget, as adopted or amended.[12] Pay raises may also be given using BEP funds generated in salary components for nonlicensed personnel.[13] There is, however, no statutory requirement that all employees or personnel must receive the same across-the-board pay raise. It appears that the local school board has the discretion to determine whether and to whom pay raises may be given. Based on the applicable statutes, local

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[9] *See* Tenn. Comp. R & Regs. 0520-1-2-.03.

[10] TENN. CODE ANN. § 49-2-203(a)(2).

[11] TENN. CODE ANN. § 49-2-301(b)(1)(K) and (W).

[12] TENN. CODE ANN. § 49-3-306(d).

[13] *Id.*

school boards may give pay raises to some employees or contractors and not others, subject, however, to any applicable contract provision, collective bargaining agreement, local school board policy or state board of education policy that states otherwise. Further, pay raises may not be withheld based on any discriminatory reason prohibited by law.

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