



OSAGE NATION ATTORNEY GENERAL OFFICE

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FILED

OPINIONS OF THE ATTORNEY GENERAL OF THE OSAGE NATION ONAG-2015-14

DEC 09 2015

By K. Bundle

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation.

This Office has received your request for an Official Attorney General Opinion regarding language in the FY 16 appropriation bills for divisions. Specifically, the bills contain the following language:

- A. All individual salaries paid out of this appropriation law shall not be increased during this 2016 fiscal year, and shall only be paid at or below the current rate on file in the Human Resources Department on the effective date of this Act. This limitation does not prohibit the award of financial performance recognition known as merit bonuses, but does supersede base pay adjustments under 19 ONC § 3-101 et seq.
- B. The Treasurer shall determine the amount of tribal funds in the salaries and wages line item, and also determine the amount of tribal funds required to pay the salaries paid out of this appropriation law at the current rate. The Treasurer shall return the excess tribal revenue in the salaries and wages line item to the general fund in the Treasury within thirty (30) days from the effective date of this Act.

To which you ask:

- 1. Does the above language apply to individual employees or specific employment positions?
- 2. Does the above language prohibit re-evaluation of a job which may result in a pay increase as required under the Osage Nation Pay for Performance Act?

3. Does the above language prohibit pay increases for changes and/or increases in job duties when the title of the position does not change?
4. Does the above language prohibit giving an employee the 5% education raise according to HR policy when an employee completes their higher education degree?
5. Does the above language in Section A when read together with Section B only apply to tribal funds regarding Base Pay Adjustments?

I. SHORT ANSWER

1. The above appropriation bill language applies to specific positions and not individual employees.
2. The above appropriation bill language does not prohibit re-evaluation of a job which may result in a pay increase as required under the Osage Nation Pay for Performance Act.
3. The above appropriation bill language does not prohibit pay increases for changes and/or increases in job duties when the title of the position does not change so long as HR does a re-evaluation of the job description and that re-evaluation affords HR to set a new salary range.
4. The above appropriation bill language prohibits giving an employee the 5% education raise according to HR policy when an employee completes their higher education degree as this constitutes a base pay adjustment.
5. The above appropriation language in Section A when read together with Section B does not only apply to tribal funds regarding base pay adjustments; however, the recapture provision in Section B only applies to tribal funds.

II. DISCUSSION

1. Application to Specific Positions vs. Individual Employees

The appropriation bill language says in Section A that “(a)ll *individual salaries* paid out of this appropriation law shall not be increased during this 2016 fiscal year...[emphasis mine]” However, employees are listed in the appropriation bills by position. This apparent discrepancy

leads you ask whether the “individual salaries” language applies to specific positions or individual employees?

As with most issues in a fledgling government, this is a matter of first impression with no Osage Nation common law on which to rely. Given this lack of direction, we have to examine the statutory language and legislative record to determine the statute’s intent and purpose. We will depend upon federal canons of statutory construction and federal case law as guidance to interpret the appropriation bill language and apply those interpretations to answer your questions.

The starting point in statutory interpretation starts by examining the language itself. Courts often cite to the “plain meaning rule,” which says that if the statutory language is clear, then there is no need to look to legislative history or intent.¹ Here, Congress uses the phrase “individual salaries paid out of this appropriation law shall not be increased,” which seems to mean that the appropriation bill language limiting salary increases applies to individuals rather than to positions.

However, the appropriation bill language goes on to state “...at or below the current rate on file with the Human Resources Department...” This language refers to the requirement of the Osage Nation Workforce Pay for Performance Act (“WPPA”) that mandates the Office of Human Resources (“HR”) maintain as public records certain employment information; specifically:

1. A formal position description which documents each employee’s current duties, responsibilities and minimum qualifications;
2. A salary range which sets a minimum and a maximum salary rate for each position calculated and set no more often than every three years;
3. A consistent application and definition of position titles across all organization entities; and
4. Any additional recommended actions consistent with this Act.²

For our analysis, it is significant that all references to HR records in the WPPA are by position and not by individual employees. This lends ambiguity to the appropriation bill’s use of

¹ See e.g., Caminetti v. United States, 242 U.S. 470 (1917).

² 19 ONC § 3-106(A).

the term “individual salaries” as HR determines salary based on position description and title and this position is inserted into the division appropriation bill with a certain salary. It is unclear whether Congress intends the salaries to be paid out at the FY15 level for the individual employee, no matter what their position is; or whether the salary remains the same for the position, no matter who the individual employee is.

Since the statutory language is not plain and is instead ambiguous, we must examine other canons, rules, and presumptions of statutory construction. Secondary to the plain meaning is the canon of legislative intent. A “proper construction frequently requires consideration of [a statute’s] wording against the background of its legislative history and in light of the general objectives Congress sought to achieve.”³ And, the statute’s text should be read in light of the context and interpreted so as to carry out the generally expressed legislative policy.⁴

To determine the statutory purpose and expressed legislative policy, we must examine the legislative history behind the appropriation bill language. The discussions accompanying the bills consideration as well as the sequence of changes in the bill language are significant factors in determining statutory purpose and legislative policy. Consideration of the “specific history of the legislative process that culminated in the [statute at issue] affords...solid ground for giving it appropriate meaning.”⁵

Based on the evidence in the congressional record concerning the appropriation bill language, Congress added Section A as an amendment to the division appropriation bills and then Section B as an amendment to the Section A amendment.⁶ In discussions regarding the

³ Wirtz v. Bottle Blowers Ass’n, 389 U.S. 463, 468 (1968).

⁴ SEC v. Joiner, 320 U.S. 344, 350-51 (1943).

⁵ United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222.

⁶ 4th Osage Cong. Tzi-Sho Session, Day 19, Part 3, October 2, 2015.
(<https://www.youtube.com/watch?v=QDcAnHwpImo&feature=youtu.be>).

amendments' passing, Congress raised two main concerns. One, the lack of revenue to cover the proposed raises in the division bills. And two, the failure to use the process established in the WPPA regarding annual base pay adjustments.⁷

In its first concern, Congress points to the \$7 million reduction in revenue from FY15 to FY16 and wonders how the salary increases will be paid for given this substantial loss in revenue; also noting that one factor in the WPPA allowing the HR Office to recommend annual base pay adjustments is the level of anticipated financial performance of the Nation.⁸ This Congressional concern stems from the Constitutional prohibition against appropriating more money than projected revenues.⁹ However, after raising its concerns regarding lack of revenue to cover the proposed salary increases, Congress did not decrease the requested division appropriation accordingly. Instead, Congress inserts the language in "Section B" above wherein Congress attempts to recapture funds already appropriated to the divisions. The Constitution makes no mention of recapture as a remedy for an appropriation budget over projected revenues. If Congress has reason to believe the appropriation is in excess of projected revenues, they could have appropriated less than the requested division amount. Therefore, Congress' first concern being there is not enough revenue to cover the projected salary increases becomes moot upon enacting the appropriation bills without any reductions in the salaries and wages line items, as any Constitutional prohibition against appropriating funds over projected revenue occurs when Congress appropriates the money to the division, regardless of the bill's recapture provision.

⁷ *Id.* Congressman R.J. Walker opined that several hundred employees received wages last year and an unknown amount were either receiving or proposing salary increases this year. Interestingly Congress froze all salaries without inquiry into whether the individual position increase was in fact part of the HR base wage adjustment procedure in the WPPA or not; or if the individual salary increase was an adjustment up in the salary range already calculated in previous years.

⁸ *See*, 19 ONC § 3-106(B)(2)(c).

⁹ *Osage Nation Const.*, Art. VI, Sec. 23.

With the Congress' first concern alleviated, this leaves us to determine whether the second Congressional concern regarding the avoidance of the WPPA allows us to determine if the bill language applies to the individual employees or the specific employment positions. Congress was concerned whether the proposed division budget salary increases bypasses the WPPA's procedures for annual base pay adjustments, specifically that the WPPA limits salary increases to every three years.¹⁰ In looking at the WPPA language, it requires HR to maintain records specific to the position, rather than the individual employee. For example, the WPPA requires HR to establish a formal position description with current duties and minimum qualifications¹¹ and to apply the position title definition consistently across all organization entities.¹² The WPPA also requires HR to set a salary range for each position.¹³ There are no references in the WPPA related to the individual employee. When we read the appropriation bill language regarding the pay out of "individual salaries" in the context of the WPPA, the term is read to effectuate the statutory purpose in the WPPA, which is consistency among positions without regard to the individual employee;¹⁴ and therefore, the term applies to the specific employment position and not the individual employee.

This interpretation also makes more sense when applied in practice.¹⁵ For example, John is a Division Leader with a current salary rate on file with HR at the end of FY15 of \$65,000. John applies for and is awarded the Director of Operations position in FY16. The Director of

¹⁰ 19 ONC § 3-106(A)(2).

¹¹ 19 ONC § 3-106(A)(1).

¹² 19 ONC § 3-106(A)(3).

¹³ 19 ONC § 3-106(A)(2).

¹⁴ 19 ONC § 3-102(F)(1).

¹⁵ United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988). Justice Scalia wrote, "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Operation's salary rate on file with HR at the end of FY15 is \$115,000. In this case, John is paid the Director of Operation's salary rate of \$115,000 and is not required to keep his former Division Leader salary rate, as the appropriation bill language applies to the position and not the individual.

2. and 3. No Prohibition Against Job Re-evaluation Which May Result in a Pay Increase, Whether or Not the Position Title Changes

Your questions #2 and #3 involve the same analysis and discussion points. As such, I am combining them for my opinion.

The appropriation bill language states that the salaries contained therein "shall only be paid at or below the current rate on file in the Human Resources Department on the effective date of this Act." Using the plain language rule, the appropriation bill language prohibits an individual employee from receiving a salary increase in FY16 if their current position salary rate is on file with HR at the end of FY15. Congress is clear on their legislative intent and through plain language that they meant no division employee will receive a pay raise in FY16 for doing the same work at the same position as FY15.¹⁶

However, the appropriation bill language does not prohibit the re-evaluation of a job which may result in a pay increase as required under the WPPA. The only prohibition contained in the appropriation bill language refers to WPPA base pay adjustments. Base pay adjustments consist of "special adjustments" and "annual base pay adjustments."¹⁷ Special adjustments are recommended by HR as one-time adjustments intended to correct internal or external compensation inequities.¹⁸ Annual base pay adjustments are recommended by HR based on one or more factors, including: (1) annual movement of comparable wages in the local market; (2)

¹⁶ 4th Osage Cong. Tzi-Sho Session, Day 19, Part 3, October 2, 2015.
(<https://www.youtube.com/watch?v=QDcAnHwplmo&feature=youtu.be>).

¹⁷ 19 ONC § 3-106(B).

¹⁸ 19 ONC § 3-106(B)(1).

employee level performance which meets or exceeds the designated level; (3) the Nation's anticipated financial performance level; and (4) other factors consistent with HR process and procedures.¹⁹ Both special and annual base pay adjustments are prohibited by the language in Section A of the appropriation bill.

However, both types of base pay adjustments occur after, and therefore are not included in, HR's duty in the WPPA to maintain a formal position description with the employee's *current* duties, responsibilities, and minimum qualifications.²⁰ It follows from the plain reading of this section that if the employee's duties change, then they are not *current* and that position must be re-evaluated. Upon re-evaluation, HR calculates and sets a minimum and maximum salary rate for the position, which cannot be changed for three years.²¹ This new rate may be, and probably will be, different than the rate on file for the position, given that the position's duties, responsibilities, and/or minimum qualifications have changed. Therefore, it is conceivable, and not specifically prohibited by Section A as Congress clearly could have done so,²² that a position may be re-evaluated resulting in an increase in salary where the position duties have changed but the position title has not.

4. Prohibition Against Giving an Employee the 5% Education Raise According to HR Policy When an Employee Completes Their Higher Education Degree

The 5% raise given to an employee for completing their higher education degree is included in the annual base pay adjustment of the WPPA and is therefore, as discussed in Section 2 and 3 above, prohibited under the division appropriation bill language. The language in the appropriation

¹⁹ 19 ONC § 3-106(B)(2).

²⁰ 19 ONC § 3-106(A)(1)[emphasis mine].

²¹ 19 ONC § 3-106(A)(2).

²² Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001). Noting, while Congress cannot be expected to anticipate and address *all* issues that may arise, the Court does sometimes assume that Congress will address major issues, at least in the context of amendment.

bills limiting salary increases states that it “does not prohibit the award of financial performance recognition known as merit bonuses, *but it does supersede base pay adjustments*” in the WPPA [emphasis added]. As discussed above, base pay adjustments include annual base pay adjustments given to the employee based on certain factors, including “other such factors consistent with the process and procedures defined and implemented by the Office of Human Resources.”²³ The award of the 5% raise to an employee for completing a higher education degree is a HR policy and fits within of this section as an award of an annual base pay adjustment. According to the plain meaning of the appropriation bill language, the 5% education raise is prohibited as it is a base pay adjustment to a salary rate currently on file with HR.

5. The Above Language in Section A When Read Together with Section B Does Not Only Apply to Tribal Funds Regarding Base Pay Adjustments.

The appropriation bill language regarding base pay adjustments applies to both tribal and federal funds; however, the recapture provision in Section B only applies to tribal funds. Section A states in principal that no salaries paid out of this appropriation shall be increased during FY16. However, the appropriations bills were passed without any reductions to the salaries and wages line item. In order to prevent the excess appropriated money in the salaries and wages line items from remaining in the treasury without being able to be spent, Congress made an amendment to their Section A amendment.²⁴ This new amendment, labeled Section B, mandated the Treasurer to determine the excess amount of *tribal funds* in the salaries and wages line item and return these funds to the general fund. Section B is silent on the return of excess federal funds in the salaries and wages line item. This leads to your question as to whether the appropriation bill language,

²³ 19 ONC § 3-106(B)(2)(d).

²⁴ 4th Osage Cong. Tzi-Sho Session, Day 19, Part 3, October 2, 2015. Amendment proposed by Congresswoman Shannon Edwards. (<https://www.youtube.com/watch?v=QDcAnHwpImo&feature=youtu.be>).

when read as a whole, allows individual salary increases if those increases are paid out of federal funds.

Again we must turn to legislative intent and purpose for guidance. In discussions regarding the amendments' passing, Congress noted that the Treasurer cannot recapture federal funds and place them in the general fund as they are program specific and can be spent in other areas of the same program but cannot be spent on other tribal programs.²⁵ Most, if not all federal funds, comes from federal grants that have spending restrictions attached to the award. These spending restrictions are known as allowable costs and are specific to the federal award's parameters. For example, federal housing funds previously designated for salaries and wages but incapable of being paid due to the base pay rate adjustment prohibition cannot be returned by the Treasurer to the general fund to be used by the Membership Department, but they may be reprogrammed to other line items and used on other housing program related expenses, such as home rehabilitation. Congress said what it meant to say in the statutory language and only applied Section B to recapture tribal funds while intentionally being silent to federal funds, as Congress knew it did not have the power to legislatively recapture federal funds and return them to the treasury. Therefore, we cannot read the appropriation language Section A regarding base pay adjustments as only applying to tribal funds when clearly Congress knew that both tribal and federal funds were in the salaries and wages line items and knew how to separate the two if they so desired,²⁶ and in fact did so in the recapture provision.

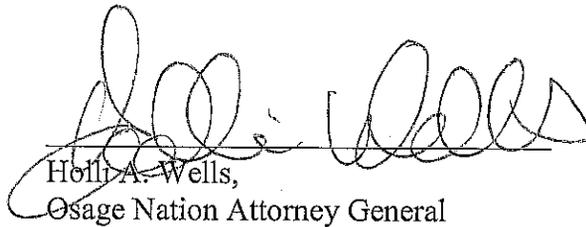
III. CONCLUSION

²⁵4th Osage Cong. Tzi-Sho Session, Day 19, Part 3, October 2, 2015. Comment by Congressman R.J. Walker. (<https://www.youtube.com/watch?v=QDcAnHwplmo&feature=youtu.be>).

²⁶*FMC Corp. v. Holliday*, 498 U.S. 52, 66 (199). Justice Stevens in his dissent stating that “[i]f Congress had intended such an irrational result, surely it would have expressed it in straightforward English.”

The appropriation bill language in Section A regarding individual salaries and base pay adjustments applies to specific positions and not individual employees. The appropriation bill language in Section A refers to freezing current salary rates on file as of the end of FY15 and does not prohibit HR from performing a job re-evaluation, as required under the Osage Nation Pay for Performance Act, which may result in a pay increase, regardless whether the position's title changes. However, the appropriation bill language in Section A prohibits giving an employee the 5% education raise according to HR policy when an employee completes their higher education degree as this constitutes a base pay adjustment. And, the appropriation language in Section A, when read together with Section B, does not only apply to tribal funds regarding base pay adjustments; however, the recapture provision in Section B only applies to tribal funds.

Respectfully submitted,



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