OPINION NO. 76-047

Syllabus:

When a state affiliated university has entered teaching contracts with its faculty, which contracts provide for salary increases resulting from wage negotiations currently in progress, the university may pay such increase for all services rendered pursuant to that contract.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, June 25, 1976

You have requested my opinion concerning the "payment of retroactive pay as proposed in the recent wage agreement signed by the University of Cincinnati Board of Directors after negotiations with the faculty representatives (AAUP) acting as bargaining agents." Specifically you have posed the following question:

> The faculty bargaining agents (AAUP) began meeting with the University administration early last year for the purpose of negotiating wage contracts for the academic year 1975-76, the contracts to be effective September 1, 1975. All present faculty members signed such contracts during the month of September 1975 at their last wage scale, such faculty salary increases effective as of September 1, 1975 on an agreement reached and approved by the Board of Directors on April 3, 1976.
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> Using public funds, does the University have the authority to pay additional compensation to make such salary increases retroactive to September 1, 1975 for services which have already been performed and for which compensation has been paid in accordance with a previously existing contract?

For the reasons discussed below, I am of the opinion that the payment of salary increases from September, 1975, is legal and proper.

The University of Cincinnati has executed an agreement with the Ohio Board of Regents pursuant to R.C. 3349.31, and it is, therefore, a municipal, state-affiliated university with all the powers and authority of a municipal university, unless otherwise provided by law. In this respect R.C. 3349.33 states in pertinent part:

> "The municipal university with which an agreement exists under sections 3349.31 to 3349.33, inclusive, of the Revised Code shall be deemed to be an instrumentality also of the state serving as a state-affiliated institution for the higher education of the people of the state, provided that the conduct of such university, including its affiliated units, shall in all respects continue to be under applicable provisions of the law governing municipal universities and without limitation of the foregoing. Section 3349.30 of the Revised Code is applicable to sections 3349.31 to 3349.33, inclusive, of the Revised Code, and agreements made thereunder." (Emphasis added)

R.C. 3349.03 sets forth the powers of the directors of a municipal university as follows:

> "The board of directors of a municipal university, college, or other educational institution, as to all matters not otherwise provided by law, has all the authority, power, and control vested in or belonging to such municipal corporation as to the sale, lease, management, and control of the estate,

> property, and funds, given, transferred, covenanted, or pledged to such municipal corporation for the trusts and purposes relating thereto and the government, conduct, and control of such institution.
> . . . .
> The board may . . . .
> (B) Appoint the president, secretaries, professors, tutors, instructors, agents, and servants, necessary and proper for such institution and fix their compensation . . . ."

The Board of Directors of the university may, therefore, determine the compensation to be paid to faculty members pursuant to employment contracts.

In the situation you have outlined contracts with faculty members were entered in September, 1975, and provided that compensation be paid according to previous wage rates, subject to any increases resulting from negotiations in progress at that time. Thus the contracts pursuant to which the university received teaching services during the 1975-1976 year, contained the following provision:

> "This salary is subject to revision in accordance with any collective bargaining agreement resulting from the current negotiations between the University of Cincinnati and the Cincinnati Chapter American Association of University Professors."

You have suggested that this contract form had never been approved by the Board of Directors pursuant to R.C. 3349.03 and that the above provision is consequently inapplicable. However, it appears clear from the facts you have set out that the Board and the University did in fact approve the contracts and have accepted services rendered by the faculty in accordance with such agreements. Therefore, in the absence of a statutory or constitutional provision to the contrary the payment of salary increases may be made for all services rendered subsequent to the time the contract was entered.

The primary concern with the proposed payments is whether they are prohibited by Article II, Section 29, Constitution of Ohio, which reads:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

In 1976 Op. Atty. Gen. No. 76-015 I had occasion to consider the scope and effect of the above section. I

noted that Article II, Section 29, supra, is broad in its scope. On that point I referred to State ex rel. Field v. Williams, 34 Ohio St. 218 (1877) in which the Ohio Supreme Court discussed this section and said at p. 219:

> "The first clause of the section quoted inhibits the allowance of extra compensation to any officer, public agent, or contractor, after the services shall have been rendered or the contract entered into.
>
> "This language is very broad, and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract.
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> "In the first, compensation, in addition to that fixed by law at the time the services were rendered, and, in the second, the allowance of compensation in addition to that stipulated in the contract, is inhibited by the first clause of the section." (Emphasis added)

In view of the foregoing I concluded that when new increased salaries were negotiated, a county engineer was without authority to make those increases retroactive to the beginning of the calendar or fiscal year for services which had already been rendered and for which compensation had already been paid in accordance with the previously existing contract or wage schedule.

It is significant that Op. No. 76-015, supra, involved a situation in which work was performed in accordance with the provisions of an earlier contract, at the then existing wage schedule. Unlike the fact pattern you describe no new work contract, which provided for increases in salaries as the result of wage negotiations then in progress, had been entered before the services were rendered. Therefore, since such payments had not been stipulated in a prior contract they were prohibited by Article II, Section 29, supra.

However, in the present case, payment of the increase is expressly provided for in the contract. Therefore, the rationale used in Op. No. 76-015, supra, is not applicable, and the prohibition in Article II, Section 29, supra, does not operate to preclude such payments.

Finally, I would direct your attention to 1939 Op. Atty. Gen. No. 1330, p. 1966, in which my predecessor ruled that Article II, Section 29, supra, did not apply to

municipal corporations and other political subdivisions and, therefore, did not operate to prohibit the payment of moral obligations by such political subdivisions. This opinion has been cited in several unreported common pleas court decisions, which permitted the retroactive payment of salary increases for school board employees. Ashtabula Area Education Association v. Ashtabula Bd. of Education, (Ashtabula Co. Com. Pl. Ct. No. 59406, 1972); Newton Falls Classroom Teachers Assoc. v. Newton Falls Exempted Village School District, Bd. of Educ. (Trumbull Co. Com. Pl. Ct., 1972); Springfield Education Association v. Springfield City Bd. of Educ. (Clark Co. Com. Pl. Ct. No. 75 CIV 1394, 1975).

While it may be argued that the rationale employed in Op. No. 1330, supra, extends to a municipal university, it is not necessary to discuss either the correctness of that rationale or of the 1939 Opinion itself. As the court noted in Ashtabula Area Education Assoc. v. Ashtabula Bd. of Education, supra, that issue is moot since the contract itself provides for the payment of any salary increases. See also the Newton Falls Classroom Teachers Assoc. case to the same effect.

In specific answer to your question it is, therefore, my opinion and you are so advised that, when a state-affiliated university has entered teaching contracts with its faculty, which contracts provide for salary increases resulting from wage negotiations currently in progress, the university may pay such increase for all services rendered pursuant to that contract.