OPINION NO. 2007-010

Syllabus:

1. The Secretary of State has no authority to award bonuses for exemplary service to the Secretary's unclassified employees, who are exempt from collective bargaining coverage, unless the payments are made as part of a program established by the Director of the Department of Administrative Services under R.C. 124.17.
2. The Secretary of State has no authority to make severance payments to unclassified employees, who are exempt from collective bargaining coverage, and who are anticipating the termination of their employment at the end of the Secretary's term of office.
3. If the report of an audit of the Secretary of State's Office, which is conducted by the Auditor of State, shows that public money was illegally expended, the Attorney General may institute a civil action in the name of the Secretary of State to recover the funds.
4. The Secretary of State and Attorney General may proceed under the

collections process established by R.C. 131.02 and R.C. 131.03 to recover an overpayment of money that was made by the Office of the Secretary of State, and is ''payable to the state.''

To: Jennifer Brunner, Ohio Secretary of State, Columbus, Ohio
By: Marc Dann, Attorney General, May 23, 2007

You have asked about the authority of the Secretary of State to give unclassified staff members bonuses or severance payments in excess of their ordinary salaries. You have also asked about the method of recovering these payments if we conclude that the Secretary of State has no authority to make them.

Bonuses

Your first question is whether a state elected officeholder has the authority to give bonuses to some, but not all, of the unclassified employees in his or her office. You explain that, shortly before his term expired on January 7, 2007, the previous Secretary of State made to unclassified staff members payments that were in excess of the employees' ordinary salaries. These payments, deemed bonuses, ranged in amount from one week to one month of the employees' usual salary, and were reportedly made to recognize past service. The bonuses were given to senior staff members, and you state that they all held positions in the unclassified service. We assume that they were also exempt from collective bargaining.[1] Although the former officeholder had apparently distributed bonuses in previous years to individual employees, no office-wide policy or program, with eligibility criteria, criteria for determining payment amounts, or other guidelines for distribution of bonus payments, had been established.

No statute expressly authorizes the Secretary of State to award performance bonuses to employees.[2] Because your question concerns payments to state employ-

[1] ''Public employees'' (including state employees) have the right to ''[b]argain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements.'' R.C. 4117.03(A)(4). *See also* R.C. 4117.08 (matters subject to collective bargaining); R.C. 4117.10(A) (terms of a collective bargaining agreement). Certain types of employees, however, are not ''public employees'' for purposes of R.C. Chapter 4117—the terms and conditions of their employment continue to be governed by R.C. Chapter 124, as discussed below. These types of ''exempt'' employees include confidential employees, management level employees, and supervisors. R.C. 4117.01(C). As noted, we assume that the employees about whom you ask held positions that were exempt from collective bargaining.

[2] *Cf.* R.C. 124.181(O) (''[e]mployees of the office of the treasurer of state who are exempt from collective bargaining coverage may be granted a merit pay supplement of up to one and one-half per cent of their step rate. The rate at which this

ees, however, we must consider whether the Secretary of State has the implied authority to pay bonuses to his or her employees as part of their compensation. As a general matter, a public officer or agency with the power to employ has the concomitant power to set the compensation of the office's or agency's employees. *Ebert v. Stark County Bd. of Mental Retardation,* 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). The power to fix compensation includes the authority to provide employees with fringe benefits, as well as to set employees' salaries. *Ebert v. Stark County Bd. of Mental Retardation; State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976). A public employer's authority to compensate, however, is subject to any constricting statutory provisions, and an employer may not reduce employees' compensation below that to which they are entitled as a matter of statute. *Ebert v. Stark County Bd. of Mental Retardation; Fraternal Order of Police, Lodge 39 v. City of East Cleveland,* 64 Ohio App. 3d 421, 581 N.E.2d 1131 (Cuyahoga County 1989).

The authority of state employers to fix the compensation of their employees is limited considerably by the comprehensive statutory scheme that has been established by the General Assembly to govern the salary and fringe benefits of state employees who are exempt from collective bargaining. *See generally Ebert v. Stark County Bd. of Mental Retardation* (the authority to compensate is subject to constricting statutes). Under this statutory scheme, the Director of the state Department of Administrative Services (DAS) is required to establish a job classification plan "for all positions, offices, and employments the salaries of which are paid in whole or in part by the state," and must assign each classification within the classification plan to a pay range under R.C. 124.15 (for employees who are not exempt from collective bargaining coverage) or R.C. 124.152 (for employees who are exempt from collective bargaining). R.C. 124.14(A)(1). *See also* R.C. 124.181 (certain employees may receive pay supplements based on longevity, exposure to hazardous conditions, unique job requirements (such as the ability to speak or write a language other than English), shift differentials, and other special circumstances or conditions). The fringe benefits provided to state employees are also established by statute. *See, e.g.,* R.C. 124.13 and R.C. 124.134 (vacation leave); R.C. 124.382-.384 (sick leave); R.C. 124.385 (disability leave); R.C. 124.386 (personal leave); R.C. 124.81-.82 (life and health insurance).

From the comprehensive nature of this statutory scheme, previous opinions have concluded that the General Assembly has reserved for itself the authority to directly set the compensation of state employees (who are exempt from collective bargaining), rather than leave to the discretion of each state appointing authority[3] the ability to vary or supplement its employees' salaries and fringe benefits. *See* 1984 Op. Att'y Gen. No. 84-036 at 2-114 ("[u]nless implemented pursuant to a col-

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supplement is granted shall be based on performance standards established by the treasurer of state. Any supplements granted under this division shall be administered on an annual basis").

[3] R.C. 124.01(D) defines "appointing authority" for purposes of R.C. Chapter 124 as "the officer, commission, board, or body having the power of appointment

lective bargaining agreement ... a state appointing authority has no power to grant its employees fringe benefits. Such benefits must be granted by the General Assembly''); 1983 Op. Att'y Gen. No. 83-042 at 2-164 (''[i]t is clear that the salary and fringe benefits of state employees are expressly regulated by statute,'' and ''[u]nder the existing statutory scheme, a state agency has no authority to grant additional fringe benefits to its employees''); 1983 Op. Att'y Gen. No. 83-029 at 2-109 (the ''compensation of state employees is governed by a statutory scheme which is not subject to change by the various state appointing authorities''); 1981 Op. Att'y Gen. No. 81-056 at 2-224 to 2-225 (directors or other administrative heads of the various state departments and agencies ''may employ necessary employees,'' but ''they do not have specific authority to fix their employees' compensation. The General Assembly has created a statutory scheme pursuant to which state employees are compensated,'' and the ''salary and fringe benefits of state employees are, therefore, expressly regulated by statute'' (footnote omitted); 1977 Op. Att'y Gen. No. 77-090 at 2-304 (''[a]s are all other forms of compensation for state employees, fringe benefits are expressly regulated by statute'').

State elected officeholders are appointing authorities for purposes of R.C. Chapter 124, *see* note 3, *supra*, and, as such, they and their employees are subject to the provisions of that Chapter. *See* R.C. 124.01(F) (an ''employee'' subject to R.C. Chapter 124 ''means any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer''); *State ex rel. Neffner v. Hummel*, 142 Ohio St. 324, 51 N.E.2d 900 (1943); *Henslee v. State Personnel Bd. of Review,* 15 Ohio App. 2d 84, 239 N.E.2d 121 (Franklin County 1968).[4] State elected officeholders arguably have greater authority than other state appointing authorities to fix the salaries of their unclassified employees who are exempt from collective bargaining, however, because ''employees who are in the unclassified civil service and exempt from collective bargaining coverage'' in the offices of the Secretary of State, Auditor of State, Treasurer of State, and Attorney General, among others,[5] are expressly excluded from the classification and pay range scheme

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to, or removal from, positions in any office, department, commission, board, or institution.''

[4] *See also, e.g.,* R.C. 124.11(A)(8) (''[f]our clerical and administrative support employees for each of the elective state officers'' may be in the unclassified service); R.C. 124.15(G)(2)(b) (moratorium on step increases, now expired, applied to the employees of the Secretary of State, Auditor of State, Treasurer of State, and the Attorney General, unless the officeholder decided to exempt the office's employees from the moratorium).

[5] Exempt from R.C. 124.14(A), R.C. 124.15, and R.C. 124.152 are: elected officials, legislative employees and employees of the Legislative Service Commission, employees in the Office of the Governor, employees of the Supreme Court, unclassified employees in the offices of the Secretary of State, Auditor of State, Treasurer of State, and the Attorney General who are exempt from collective bargaining coverage, and ''[a]ny position for which the authority to determine compensation is given by law to another individual or entity.'' R.C. 124.14(B).

set forth in R.C. 124.14(A), R.C. 124.15, and R.C. 124.152. R.C. 124.14(B)(2).[6] *Cf.* R.C. 124.152(D) (an employee exempt from collective bargaining (but presumably classified) who is paid in accordance with R.C. 124.152 "includes a permanent full-time or permanent part-time employee of the secretary of state, auditor of state, treasurer of state, or attorney general who has not been placed in an appropriate bargaining unit by the state employment relations board"). We have not previously advised on the scope of a state elected officeholder's authority to set the compensation of his or her unclassified employees who are exempt from collective bargaining, nor are we aware of any judicial decision addressing the question. In further examining the provisions of R.C. Chapter 124, we find, however, that we need not determine the full extent of a state officeholder's authority to fix the compensation of these employees in order to resolve your question.

Even though a state elected officeholder is not bound by R.C. 124.14(A), R.C. 124.15, or R.C. 124.152 in fixing the salary of the office's unclassified employees who are exempt from collective bargaining, the General Assembly has legislated specifically with regard to the award of bonuses to these specific types of employees, and thus has limited the authority of state elected officeholders to establish the same sort of benefit for these same employees. *See* 1981 Op. Att'y Gen. No. 81-052 at 2-202 ("[i]f an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit"). R.C. 124.17 authorizes the Director of DAS to "establish a program for the recognition of exemplary performance of employees" listed in R.C. 124.14(B)(2), which includes the unclassified employees in the Office of the Secretary of State who are exempt from collective bargaining.[7] R.C. 124.17 further provides that, the "program may include, but is not limited to, cash awards, additional leave, or other provisions as the director considers appropriate, and the director shall adopt rules in accordance with Chapter 119. of the Revised Code to

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Also exempt are employees of a county children services board that establishes compensation rates under R.C. 5153.12, and employees of the Bureau of Workers' Compensation whose compensation is established by the Administrator under R.C. 4121.121(B). *Id.*

[6] You have asked about the application of R.C. 124.15(H) to the previous Secretary of State's actions. R.C. 124.15(H) states that employees "in appointive managerial or professional positions," who are paid in accordance with schedule E-2 of R.C. 124.152, may not receive salary adjustments more frequently than once in any six-month period. You state that, many of the bonuses at issue were given to employees within six months after the employees had received salary increases in July, 2006. As discussed, R.C. 124.14(B) excludes unclassified employees in the Office of the Secretary of State, who are exempt from collective bargaining, from R.C. 124.15; thus, R.C. 124.15(H) does not apply to the employees about whom you ask.

[7] R.C. 124.17 also applies to some of the other employees who are exempt under R.C. 124.14(B) from the classification and pay range scheme set forth in R.C. 124.14(A), R.C. 124.15, and R.C. 124.152, *see* note 5, *supra,* and to employees paid in accordance with R.C. 124.152.

provide for the administration of the program." *See* 2 Ohio Admin. Code 123:1-27-04 (setting forth guidelines for participation in the employee recognition program, eligibility, and eligible areas of recognition); rule 123:1-27-05 (governing the selection of nominees, amounts of awards, and award presentation).

The application of R.C. 124.17 to the ability of a state agency, the Rehabilitation Service Commission (RSC), to establish an employee recognition program and grant monetary awards to its employees for outstanding and meritorious service, was addressed in 1988 Op. Att'y Gen. No. 88-016. Concluding first that, as a state agency, the RSC has no authority to fix the compensation of its employees who are subject to R.C. Chapter 124, the opinion went on to note that, under R.C. 124.17, the Director of DAS—not each state appointing authority—is given the authority to determine whether to establish a program for the award of cash to state employees in recognition of outstanding service: "The fact that awards for state employee recognition are expressly authorized by statute in R.C. 124.17 further supports the conclusion that the RSC is without implied authority to establish such a program for those of its employees whose compensation is governed by the statutory scheme prescribed by R.C. Chapter 124."[8] *Id.* at 2-64.

Therefore, even if the Secretary of State had the authority generally to establish fringe benefits for unclassified employees exempt from collective bargaining (a question we need not decide), R.C. 124.17 would divest the Secretary of State of the authority to award cash bonuses to them.[9] You have pointed out that DAS' employee recognition program had been suspended by the Governor's executive order at the time the bonus payments were made to the employees in question. This suspension demonstrates that employee bonuses, including bonuses for state officeholders' unclassified employees who were exempt from collective bargaining, were an improper expenditure of state resources at that time. (Furthermore, the suspension of DAS's program in no way cleared the way for the Secretary of State

[8] 1988 Op. Att'y Gen. No. 88-016 recognized, however, the propriety of including an employee recognition program in a collective bargaining agreement. *See also* rule 123:1-27-04(B) ("permanent employees eligible to receive employee recognition awards, pursuant to a collective bargaining agreement, are eligible to receive employee recognition awards").

[9] *Cf.* 1992 Op. Att'y Gen. No. 92-049 (the county engineer is statutorily authorized to fix the compensation of his employees, and thus may pay them an annual bonus as a fringe benefit, so long as, pursuant to R.C. 325.17, the total compensation paid to the engineer's employees does not exceed in the aggregate the total amount appropriated for the office by the board of county commissioners); 1981 Op. Att'y Gen. No. 81-052 at 2-203 ("pursuant to its express power to employ, a board of education has the general authority to compensate its teaching employees with fringe benefits which are not the subject of legislation which constricts the board's general authority." No statute constricts the authority of a board of education to pay a cash bonus to teachers based on years of employment in the district or to encourage early retirement, so long as teachers receive at least the minimum salaries established by statute).

to award cash bonuses to his employees. R.C. 124.17 remained in effect, and empowered only the Director of DAS to implement an employee recognition program once such a program again became fiscally and administratively feasible.)

As noted, the foregoing analysis characterizes bonus payments as fringe benefits and addresses the Secretary of State's authority to grant bonuses to employees as part of the employees' compensation. Given the particular facts surrounding the payments at issue, however, at least some of the bonuses may not have constituted fringe benefits for purposes of analyzing whether they were lawful, and we must determine whether the Secretary of State could have awarded the bonuses under a grant of authority other than the authority to compensate his employees.

In *Madden v. Bower,* 20 Ohio St. 2d 135, 137, 254 N.E.2d 357 (1969), the court explained that, "[t]he purpose of an employer, whether public or private, in extending 'fringe benefits' to an employee is to induce that employee to continue his current employment," and the payment of fringe benefits for a public employee "is a part of the cost of the public service performed by such employee." *See also* 1995 Op. Att'y Gen. No. 95-027 at 2-135 ("the authority of a public entity to grant fringe benefits pursuant to its power to employ extends only to types of benefits that induce an employee to accept employment or continue employment with the public entity"); 1982 Op. Att'y Gen. No 82-006 at 2-16 to 2-17 ("a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment"). Thus, an annual bonus that is "intended to reward an employee for a superior job performance during the preceding year *and to induce the employee to continue to perform well in the future as an employee*" of the employer "can be regarded as a 'fringe benefit.'" (Emphasis added.) 1992 Op. Att'y Gen. No. 92-049 at 2-199.

In this instance, the Secretary of State may have awarded at least some of the bonuses with no intent to encourage the employees' continued employment, but solely to reward or recognize the past job performance of employees who would soon be leaving the Office. If this is the case, the payments would not qualify as fringe benefits. We must determine, therefore, whether the Secretary of State had the authority to make these payments apart from any authority he might have had to compensate his unclassified employees who were exempt from collective bargaining.

Previous opinions have recognized that agency expenditures that are necessary to the agency's operation and management may be proper, even if they in some manner benefit employees, so long as the expenditures' benefits inure primarily to the public. For example, a state agency (without the authority to pay fringe benefits) may provide free parking to employees if it is "necessary to the efficient operation of the state office and is not merely an added convenience to the employee." 1977 Op. Att'y Gen. No. 77-090 at 2-305. *See also* 1983 Op. Att'y Gen. No. 83-042 at 2-165 and at 2-165, n.8 (a state agency may pay the Ohio Supreme Court registration fee on behalf of its staff attorneys if the payment is "necessary to the performance of a function or duty imposed upon an agency by an existing statute," and,

if, ''consider[ing] the relationship between the employee's duties and the purpose of the expenditure . . . the primary benefit will be to the public, rather than to the individual employee''). Where an expenditure has been made, however, '''principally for the purpose of benefiting [an] individual, although perhaps indirectly for the benefit of the public, the authority so to do has invariably been denied.''' 1983 Op. Att'y Gen. No. 83-029 at 2-111. (Citation omitted.)

In this instance, it is difficult to characterize the bonus payments as anything other than a benefit solely for the employees who received them. The bonuses were in essence a gift or gratuity to employees, who were planning to leave the Office, for the past performance of their duties—duties for which they already had been compensated. The employees provided nothing in return for the payments, and thus, it cannot be said that the bonuses were for the primary benefit of the public or to further the efficient operation and management of the Office; as gratuities, the Secretary of State had no authority to award them. *See* 1952 Op. Att'y Gen. No. 1713, p. 559, at 565 (''[t]he mere giving away of public funds to private persons without such persons rendering any service or providing any sort of consideration in return is clearly not the expenditure of public funds for a public purpose, but rather is the expenditure of public funds for a private purpose [and] has been judicially recognized as illegal in Ohio''). *See also* 1995 Op. Att'y Gen. No. 95-027; 1986 Op. Att'y Gen. No. 86-027.

In answer to your first question, therefore, the previous Secretary of State had no authority to award bonuses for exemplary service to his unclassified employees who were exempt from collective bargaining. Bonus payments may only be made to unclassified, exempt employees in the state service through a program established by the Director of Administrative Services under R.C. 124.17. [10]

Severance Payments

Your second question is whether the Secretary of State has the authority to make severance payments to some, but not all, unclassified employees in his or her office, in excess of the employees' ordinary salaries, where the employees are anticipating separating from state service at the end of the incumbent's term. You have explained that, like the bonuses, the severance payments were paid to some of the unclassified employees (also presumably exempt from collective bargaining) at the end of the previous Secretary of State's term of office, and were not part of any established program or policy. Again, no statute expressly authorizes the Secretary

[10] As of July 1, 2007, the Director of DAS will have the authority to establish an ''appointment incentive program'' to allow an appointing authority to pay to certain officers and employees, including the unclassified, exempt employees of the Secretary of State, ''a salary and benefits package that differs from the salary and benefits otherwise provided by law for that officer or employee.'' Sub. H.B. 187, 126th Gen. A. (2006) (eff. July 1, 2007) (enacting R.C. 124.141). Again, the Director of DAS must first act to establish the program, by rule, before any individual appointing authority may pay employees a salary and benefits package that differs from the compensation otherwise provided to those employees.

of State to make severance payments, and we begin with an analysis of whether the Secretary of State has the authority to give severance payments as a fringe benefit, again assuming that the Secretary of State has the authority in the first instance to fix fringe benefits for his or her unclassified employees who are exempt from collective bargaining.

As explained above, a fringe benefit is offered to induce an employee to continue his current employment. Previous opinions have concluded that a program, which offers early retirement cash incentives to employees, to encourage them to continue current employment so that they may be able to take advantage of the program at some future time, constitutes a fringe benefit. 1990 Op. Att'y Gen. No. 90-075; 1985 Op. Att'y Gen. No. 85-005. A payment is not a fringe benefit, however, if its purpose is to encourage employees who are no longer needed to retire or otherwise terminate their present employment. *Id. See also* 1995 Op. Att'y Gen. No. 95-027; 1986 Op. Att'y Gen. No. 86-027.

In this instance, the payments were made, not to encourage employees to terminate their employment, but in anticipation of the unclassified employees' termination at the end of the officeholder's term—nonetheless, the same principle applies. The payments were not offered as part of a plan to induce employees to continue their current employment, with the possibility of qualifying for severance payments when they terminated their employment at some future time. Therefore, the severance payments cannot be considered fringe benefits.

We also conclude that, like the bonuses, the severance payments cannot be viewed as promoting the efficient operation or management of the Office of the Secretary of State. The employees held unclassified positions that were exempt from collective bargaining coverage, and thus had no property interest in, or contractual right to, their positions—they could have been terminated at any time and without cause. *See generally State ex rel. Gordon v. Barthalow,* 150 Ohio St. 499, 83 N.E.2d 393 (1948) (syllabus, paragraph one) (a "public officer or public general employee holds his position neither by grant nor contract, nor has any such officer or employee a vested interest or private right of property in his office or employment"); *Lawrence v. Edwin Shaw Hospital,* 34 Ohio App. 3d 137, 517 N.E.2d 984 (Franklin County 1986). The payments were solely for the personal benefit of the employees, and the Office received no service or other consideration in return.

Some of the employees receiving severance payments reportedly agreed not to accept unemployment benefits. It is unclear whether the award of the severance payments was conditioned upon the employees' pledge not to file for unemployment benefits, but there is no indication that the Office and employees agreed that the Office had a right to recoup the severance payments if the employees did, in fact, file for unemployment benefits.[11]

Even if the Office and employees agreed that the severance payments were intended to be in lieu of unemployment benefits, the employees' forbearance from

[11] We assume that the employees were eligible otherwise for unemployment benefits. *See* R.C. 4141.01(R); R.C. 4141.28; R.C. 4141.29.

filing for benefits was not binding—''[n]o agreement by an employee to waive his right to [unemployment] benefits is valid.'' R.C. 4141.32(A).[12] Since an employee's promise to forgo receipt of unemployment benefits is unenforceable, because the Office had the power to terminate the employees at will, and because there is no indication that the Office benefited fiscally from the arrangement, it is difficult to see how the payments promoted the efficient operation of the Office or inured to the benefit of the public. Again, they are more in the nature of a gratuity to the employees, which a public office is without the authority to pay. *See* 1985 Op. Att'y Gen. No. 85-005 at 2-14 (employees of a county hospital are in the unclassified service and '''may be suspended or removed ... at any time when the welfare of such institution warrants suspension or removal'''—thus, ''it is not immediately apparent that early retirement incentive payments to those employees whose services are no longer needed at the hospital would further the efficient operation of the hospital''). *See also* 1995 Op. Att'y Gen. No. 95-027 at 2-139 (''it is difficult to image'' that severance payments proposed to be granted to the executive director of a children services board after the director resigned ''serve a public purpose or that they contribute to the efficient operation of the county children services board''); 1986 Op. Att'y Gen. No. 86-027 at 2-145 (''the payment of sick leave to the estate of an employee who died prior to the implementation of the policy serves no apparent public purpose''); 1952 Op. Att'y Gen. No. 1713, p. 559, at 565 (a board of education's payment to the superintendent to secure his assent to the termination of his contract, ''being without any proper consideration in return, becomes a mere gift of public funds to him.... The mere giving away of public funds to private persons without such persons rendering any service or providing any sort of consideration in return is clearly not the expenditure of public funds for a public purpose, but rather is the expenditure of public funds for a private purpose [and] has been judicially recognized as illegal in Ohio''). *Cf. Iberis v. Mahoning Valley Sanitary District,* 2001-Ohio-8809, 2001 Ohio App. LEXIS 5837 (Trumbull County 2001) (severance pay could be paid to the executive director of a sanitary district where provision for severance pay was a term of the contract between the executive director and the board of the district, even though the executive director was an ''at will'' employee). *See generally Kohler v. Powell*, 115 Ohio St. 418, 425, 154 N.E. 340 (1926) (''[p]ublic money may be used only for public purposes and never for private gain'').

[12] Unemployment benefits otherwise payable for any week are reduced, however, by the amount of remuneration a claimant receives with respect to that week ''in the form of separation or termination pay paid to an employee at the time of the employee's separation from employment,'' R.C. 4141.31(A)(4). Whether remuneration, paid to an employee at the time of his separation from employment, will reduce his unemployment benefits depends upon the facts of any particular situation. *See generally Feldman v. Loeb,* 37 Ohio App. 3d 188, 192, 525 N.E.2d 496 (Cuyahoga County 1987) (R.C. 4141.31(A) ''clearly requires that the remuneration be allocable to the period of unemployment.... It may be unnecessary that the claimant actually receive the payment during the period of unemployment, but some nexus between the receipt and the unemployment is essential'').

In answer to your second question, therefore, even assuming that the previous Secretary of State had the authority to set the fringe benefits of his unclassified employees who were exempt from collective bargaining, the severance payments you have described were not made to induce the recipients to continue their employment with the Office, and thus were not fringe benefits. Nor did the expenditures promote the efficient operation of the Office or inure to the primary benefit of the public. Therefore, the previous Secretary of State had no authority to make the severance payments to his employees who were terminating employment at the end of his term of office.[13]

Recovery of Funds

You have asked whether the bonuses and severance payments that were paid without authority by the previous Secretary of State may be recovered by the State. We will describe two mechanisms for doing so: through an audit report showing the unlawful payment of public money, or through an action to collect moneys "payable to the state."

1. Auditor of State

The Auditor of State has a duty to audit all public offices at least once every two fiscal years. R.C. 117.10; R.C. 117.11. The Auditor may also conduct an audit at any time at the request of a public officer, or upon the Auditor's own initiative if the Auditor "has reasonable cause to believe that an additional audit is in the public interest." R.C. 117.11. Certified copies of completed audit reports must be filed with the audited public office and the office's legal counsel. R.C. 117.26; R.C. 117.27. If the audit report shows that any public money has been "illegally expended," the public office's legal counsel may "institute civil action in the proper court in the name of the public office to which the public money is due ... for the recovery of the money . . . and prosecute the action to final determination."[14] R.C. 117.28. *See Police and Firemen's Disability and Pension Fund v. City of Akron,* 149 Ohio App. 3d 497, 2002-Ohio-4863, 778 N.E.2d 68 (Summit County), at ¶ 17 (the "plain language" of R.C. 117.28 "dictates that before a civil action may be

[13] The severance payments of the type you have described, for which there is no statutory authority, must be distinguished from the payments that state employees are statutorily entitled to receive, at the time they separate from state service, for their accrued, unused vacation leave, sick leave, and personal leave. *See* R.C. 124.134(C); R.C. 124.384; R.C. 124.386(E).

[14] In this case, the Secretary of State's legal counsel is the Attorney General. *See* R.C. 109.02; R.C. 109.12. Even where the Attorney General does not serve as legal counsel to a public office (such as a local government office), the Auditor must notify the Attorney General of every audit report showing that public money was illegally expended. R.C. 117.28. The Attorney General may take action to recover the money if the local office and its legal counsel do not do so. *Id. See also* R.C. 117.30; R.C. 117.42 (the Auditor may request the Attorney General to file appropriate actions to, *inter alia*, "enforce generally the laws relating to the expenditure of public funds").

instituted under this provision for the recovery of funds, the report must set forth that public money has been illegally expended''). If an audit report shows an illegal expenditure of public funds, a certified copy of any portion of the report that contains factual information ''is prima-facie evidence in determining the truth of the allegations of the petition'' that is filed with the court for the recovery of the illegally expended funds. R.C. 117.36.

In *State v. Hale,* 60 Ohio St. 3d 62, 573 N.E.2d 46 (1991), the Auditor of State determined, during the course of an audit of the Ohio Civil Rights Commission, that two members of the commission had been overpaid. The Attorney General filed a complaint against the two commission members to recover the overpayments, as well as against the commission's executive director, who had initiated the payroll information that resulted in the illegal payments, and had misrepresented to the Auditor the factual underpinnings of the commissioners' claims for payment. Allowing the recovery, the court rejected the commissioners' argument that they had been unaware that they had been overpaid: ''Case law establishes the absolute right of the state to recover funds disbursed in excess of a statutory allowance, even when there is no intent to defraud,'' and ''public officers cannot claim they are ignorant of the correct amount of their statutorily mandated compensation. Public officials have a duty to know the rate of pay they should receive,'' and ''[t]hose who fail to do so will have that knowledge imputed to them.'' 60 Ohio St. 3d at 64. The court also rejected the commissioners' argument that they had conferred value equal to the compensation they received: ''No legal authorization or justification exists for compensating [the commissioners] above the statutory limitation even though they adequately performed their work.'' 60 Ohio St. 3d at 65. *Cf.* 1976 Op. Att'y Gen. No. 76-017 at 2-52 (''recovery of illegally expended public funds has been unsuccessful where the state has voluntarily paid out monies in exchange for benefits received and the state is not in a position to return the recipients to their status quo held prior to payment,'' but ''recovery of public funds has been successful where outlay of public funds has resulted in an unjustified private gain to the person receiving the payments or has resulted in a payment which exceeds the public benefit received''). (Citations omitted.)

The court also found the commission's executive director to be jointly and severally liable because he had ''initiated the payroll information that resulted in the illegal payments to the commissioners,'' and had ''exacerbated the overpayment situation by representing in a letter to the State Auditor'' that the commission had met more often than it actually had, when he was aware of the proper compensation scheme at the time he wrote the letter. 60 Ohio St. 3d at 66. The court further noted that the executive director ''was the commission's 'principal administrative officer' and, in that capacity, he was required to correctly report the number of hours the commissioners attended meetings. The active misrepresentations made by [the executive director] in order to continue to pay [the commissioners] for days when no commission meetings were held clearly contravenes the wording of the statute.'' *Id. See* 1952 Op. Att'y Gen. No. 1713, p. 559 (board of education members who paid the superintendent to agree to a rescission of his contract—an expenditure not authorized by law—may be personally liable under what is now R.C. 117.28).

See also 1976 Op. Att'y Gen. No. 76-017 at 2-53 (R.C. 117.10 [now R.C. 117.28] "establishes public officials as, essentially, being in a position of strict liability").

Hale should be compared, however, to a line of cases where the courts found that compensation that was paid to public officials in good faith and under color of law was not recoverable—even where such payments were ultimately found to have been made in violation of an explicit provision of the Ohio Constitution or state statute. *See State ex rel. Parsons v. Ferguson,* 46 Ohio St. 2d at 392 ("[p]ayments which are made in good faith and under color of law cannot ordinarily be recovered, even though the payments are later found to be unconstitutional"); *State ex rel. Gillie v. Warren,* 36 Ohio St. 2d 89, 93, 304 N.E.2d 242 (1973) ("where a municipal judge has been paid an 'in term' salary increase under a higher court determination directing the same, that money shall not be recoverable, having been paid in good faith under a then lawful though ultimately determined to be erroneous court order"). *See also City of Hubbard ex rel. Creed v. Sauline,* 74 Ohio St. 3d 402, 406, 659 N.E.2d 781 (1996) (affirming *Gillie* and *Parsons,* and holding that "a public official who accepts compensation contrary to statute is under no legal duty to repay the compensation where it is subsequently determined that the official received the compensation in good faith and under color of law"). The question of whether a payment was received in good faith and under color of law is a factual issue to be determined by a trial court. *City of Hubbard ex rel. Creed v. Sauline.*

Although the *Hale* court, in upholding recovery, did not articulate a "good faith/under color of law" standard, we note that, under the facts of the case, the per diem statute under which the commissioners were paid was unambiguous. The overpayments resulted from miscalculations based on "active misrepresentations" of the days actually worked by the officials—errors of fact—rather than from a dispute over the meaning or application of the statute. By contrast, in *Parsons* and *Gillie*, the meaning of the constitutional provision, which was ultimately found by the state supreme court to bar an in-term increase in the officials' compensation, had not been settled by the supreme court at the time of the payments, and lower courts had found such payments to be lawful. In *Sauline,* the official in question went to great lengths to determine the legality of the payments, and was advised by the law director and Auditor of State that he could accept the payments—before the Ohio Ethics Commission issued an opinion that such types of payments were in violation of the state ethics law. *Cf. also Green Local Teachers Ass'n v. Blevins,* 43 Ohio App. 3d 71, 74, 539 N.E.2d 653 (Scioto County 1987) (school district had right to recover overpayments made to teachers due to a calculation error on the part of the school district's treasurer; in contrast to *Parsons* and *Gillie,* the "overpayments were the result of an arithmetical miscalculation of [the teachers'] salaries, rather than any reliance on a legal decision or court order subsequently determined to be invalid").

The Attorney General cannot engage in fact finding by means of an advisory opinion. *See* 1988 Op. Att'y Gen. No. 88-008. You may wish to consider however, the following factors. In the *Parsons* line of cases, payments were found not to be recoverable even though made contrary to explicit constitutional and statutory provisions; in this instance, there is "no express prohibition, only want of

an authorizing statute." *Board of Stark County Commissioners v. Halsy,* 1977 Ohio App. LEXIS 9109, at *8 (Stark County 1977) (the fact that the overpayment was due to lack of an authorizing statute, as compared to a violation of "constitutional dimension," was relevant in denying recovery of vacation pay made to a part-time nurse at a county hospital). Unlike *Hale,* the overpayments were not due to a misrepresentation of the facts or a calculation error, nor were they made under a legally unambiguous compensation scheme. Also, the legality of such bonus and severance payments made under the circumstances you have described has not been addressed judicially. *See State ex rel. Petro v. DeJute*, 2003-Ohio-1211, 2003 Ohio App. LEXIS 1138 (Trumbull County), at ¶ 43 (Christley, J., concurring) (explaining with approval, the statements of a federal district court in related litigation, that the definition of an illegal action requires "the existence of either a law or rule or government regulation and the violation thereof," and the Auditor of State does "not have the power to unilaterally develop, on a case by case basis, the definition of illegal, as that term is used in R.C. 117.28").[15]

2. Collection of Claims

You have asked whether the exclusive method for recovering the funds is under R.C. 117.28. A state officer may also attempt to recover money that is "payable to the state" through the collections process established by R.C. 131.02 and R.C. 131.03. The officer who administers the law under which an amount is payable is responsible for collecting the amount or "caus[ing] the amount to be collected," for payment into the state treasury. R.C. 131.02. If the amount is not paid within forty-five days after due, the officer must certify the amount to the Attorney General and notify the Director of the state Office of Budget and Management. *Id.* The Attorney General must give notice to the party indebted to the State of the nature and amount of indebtedness, and "collect the claim or secure a judgment and issue an execution for its collection." *Id. See also* R.C. 131.03; 1986 Op. Att'y Gen. No. 86-066 at 2-362 (the fees and mileage paid to a witness to appear at an administrative hearing of the state Dental Board are "payable to the state" if the witness fails to attend the hearing). You may, therefore, attempt to collect the amounts of the bonuses and severance payments that were paid by the previous Secretary of State, and, if the amounts are not paid within forty-five days after they are due,[16] certify the amounts to the Attorney General, who is authorized to collect the claim or secure a judgment for the amount due.[17]

[15] You have stated that, the previous Secretary of State had distributed bonuses to employees in previous years. You may wish to determine whether those payments were ever questioned, by the Auditor's office or otherwise.

[16] The Attorney General and the officer reporting a claim must "agree on the time a payment is due" in accordance with the provisions in R.C. 131.02 governing that determination.

[17] We are unaware of any judicial decision addressing whether the good faith/under color of law analysis applies in a collection action brought under R.C. 131.02 and R.C. 131.03.

3. Discretion in Seeking Recovery of Funds

You have asked about the scope of your discretion in seeking recovery of payments. You and the Attorney General have the discretion to pursue recovery as set forth in the respective provisions of R.C. Chapter 117 and R.C. 131.02. *See, e.g.*, R.C. 117.33 (the attorney general must approve in writing the abatement or compromise of any claim for money found to be due to any public office in an audit report); R.C. 117.35 (''[n]o judgment or final order shall be entered in a civil action commenced'' under R.C. Chapter 117 ''until the entry is submitted to the attorney general. The attorney general is hereby constituted an attorney of record in each action''); R.C. 131.02(E) (''[t]he attorney general and the chief officer of the agency reporting a claim, acting together,'' may compromise the claim ''if such action is in the best interests of the state'').

Conclusions

In conclusion, it is my opinion and you are advised that:

1. The Secretary of State has no authority to award bonuses for exemplary service to the Secretary's unclassified employees, who are exempt from collective bargaining coverage, unless the payments are made as part of a program established by the Director of the Department of Administrative Services under R.C. 124.17.
2. The Secretary of State has no authority to make severance payments to unclassified employees, who are exempt from collective bargaining coverage, and who are anticipating the termination of their employment at the end of the Secretary's term of office.
3. If the report of an audit of the Secretary of State's Office, which is conducted by the Auditor of State, shows that public money was illegally expended, the Attorney General may institute a civil action in the name of the Secretary of State to recover the funds.
4. The Secretary of State and Attorney General may proceed under the collections process established by R.C. 131.02 and R.C. 131.03 to recover an overpayment of money that was made by the Office of the Secretary of State, and is ''payable to the state.''