

## **Opinion No. 60-213**

December 2, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Mr. Richard H. Robinson Legal Division Bureau of Revenue Santa Fe, New Mexico

### **QUESTION**

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1. Is terminal leave available to employees of the executive department of the State Government where they are involuntarily terminated or dismissed for cause?
2. Is terminal leave available to employees of the executive department of the State Government where they resign voluntarily?

#### **CONCLUSIONS**

1. Yes, see analysis.
2. Yes.

### **OPINION**

#### **{\*632} ANALYSIS**

The answers to your two questions are controlled by the Rules and Regulations of the State Personnel Board. These Rules and Regulations were adopted pursuant to the authority granted by the Personnel Act, Chapter 205, Laws of 1959, compiled as Secs. 5-4-18 through 5-4-27, N.M.S.A., 1953 Comp. (PS). In accordance with the Personnel Act, the Governor appointed a State Personnel Board composed of seven members and charged the Board with the responsibility of establishing a State Personnel office and drafting rules and regulations for the classification and compensation of all employees in the executive agencies of the State.

Turning to the regulations themselves, we feel that your questions were substantially answered by Rule VIII, subparagraph 5. We first consider the third paragraph of that subsection which reads as follows:

"Any employee separated for cause may be paid any unused portion of his annual leave at the discretion of the appointing authority."

This paragraph requires an affirmative answer to your first question. Payment for unused annual leave is certainly available to affected employees, although it is within

the discretion of the appointing authority to allow or disallow it. In order that the opinion of this office may be more readily construed, we quote subsection 4 -- "Dismissals", under the section entitled "Separations":

"The appointing authority, after notice in writing to an employee, stating specific reasons therefor, may dismiss any employee for any of the following reasons:

- {\*633} a. Negligent or inefficient in his duties;
- b. Physical or mental unfitness for his duties;
- c. Insubordination;
- d. Criminal, infamous, immoral, or disgraceful conduct;
- e. Any course of conduct tending to interfere with the efficient functioning of the department;
- f. Addiction to narcotics or excessive use of intoxicating beverages;
- g. Making a false statement in any material fact or practicing any deception or fraud in securing or continuing his employment;
- h. Intentional or deliberate violation of any rule, order or regulation of the department;
- i. Conviction of any crime involving moral turpitude. When such conviction is final, the employee shall have no recourse to appeal;
- j. At the convenience of the appointing authority to preserve departmental unity."

It will be noted that while it is within the discretion of the appointing authority to allow or disallow such terminal pay if the employee is dismissed for cause, that employee may not be dismissed summarily. The regulations clearly require that notice in writing be given to such employee stating the specific reasons for dismissal.

Your second question was directed to the availability of terminal leave pay to employees who have voluntarily resigned. An affirmative answer to this question is required by paragraph 2 of Rule VIII, subsec. 5, which states as follows:

"Any employee who is separated without fault or delinquency on his part shall be paid for any unused portion of his annual leave and this amount shall not exceed one month's pay."

This section is mandatory and leaves no discretion in the appointing authority. The only limitation upon such an employee's right to payment for accumulated annual leave is

found in Part B of subsection 1 entitled "Resignations" found under the general heading of "Separations" in the Rules and Regulations. Said subsection B reads as follows:

"When an employee resigns without giving two weeks advance notice or without giving written notice to the appointing authority, accumulated annual leave will be paid the employee at the discretion of the appointing authority."

In summary, we conclude that terminal leave pay is available to involuntarily terminated employees at the discretion of the appointing authority. Terminal leave pay is available to voluntarily resigning employees as a matter of right. The only limitations upon the power of the appointing authority to dismiss are that notice must be given in writing to the dismissed employee and an authorized reason for dismissal must be stated therein. The only limitation on the right of the voluntarily resigning employee to terminal pay is the requirement that he must give 14 days' notice to the appointing authority.

By: F. Harlan Flint

Assistant Attorney General