

## Opinion No. 70-96

December 14, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** The Honorable Walter K. Martinez New Mexico State Representative P.O. Box 10 Grants, New Mexico 87020

### QUESTIONS

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May the town of Grants which has adopted a personnel ordinance by rule and regulation provide for the forfeiture of all accrued vacation leave for an employee if he fails to give two weeks written notice of resignation.

#### CONCLUSION

Yes.

### OPINION

#### {\*169} ANALYSIS

In answering your question we refer to Opinion of the Attorney General No. 64-155, issued December 28, 1964. This opinion states that vacations with pay are not for the sole benefit of the employee. Vacations do more than promote good relations between the employer and employee. A period of rest and relaxation is considered conducive to increased efficiency from which both parties benefit. **Housing Authority v. Harper**, 241 S.W.2d 347 (Tex. Civ. App. 1951). This opinion further states that a modern rule concerning political subdivisions is that upon termination of an employee's employment he may be compensated for permissible accrued vacation unless prohibited therefrom by the personnel ordinance or merit system. {\*170} **Tevis v. County of San Francisco, Cal.**, 272 P.2d 757 (1951), **Housing Authority v. Harper, supra**.

It has also been held that in the absence of a clear indication of a contrary statutory intent, an employee's separation from governmental employment should not prevent him from receiving the cash equivalent of vacation rights accrued to him for services rendered prior to his separation. **Pohle v. Christian**, 21 Cal. 2d 83, 130 P.2d 417 (1942).

Section 14-12-4, N.M.S.A., 1953 Comp. allows the city of Grants to establish a merit system by ordinance. Section 14-12-4A (2), **supra**, gives the city the power to establish rules and regulations which may include (c) pay scales and (e) methods of employment and discharge.

Thus in the present case there is a rule or regulation made possible by the personnel ordinance which would prevent the payment of accrued vacation right under certain conditions.

We can find no New Mexico statute which compels the payment of vacation terminal pay. Opinion of the Attorney General No. 64-155, **supra**, states that an employee may be compensated for accumulated vacation unless prohibited by the personnel ordinance or merit system. The case of **Willis v. City of Lubbock**, 385 S.W.2d 716 (Tex. Civ. App. 1964) appears to be in point. In this case the personnel act made no such provision for accumulated vacation leave. The city of Lubbock voluntarily adopted a policy of paying vacation leave to those leaving the classified service employment of the city. The court held:

We think it is the clear legislative intent that cities operating under the civil service statutes are not required to pay accumulated vacation pay as part of the severance or terminal pay of employees leaving the classified service. The city of Lubbock voluntarily adopted a policy of paying this vacation leave to those leaving the classified service. There being no requirement to make such payments, it follows the city's method of calculating such payments is not subject to judicial review . . ."

See also 53 Am. Jur. 2d, Section 85, page 158 which discusses generally an employer's power to cause a forfeiture of wages in whole or in part for violations or rules or regulations. Thus if wages can be caused to be forfeited, it is reasonable to conclude that a provision providing for forfeiture of vacation pay, a fortiori, would be reasonable. Therefore, for the foregoing reasons we believe that the employment contract enacted pursuant to rules and regulations authorized by the municipal personnel ordinance, is legal.

By: Frank N. Chavez

Assistant Attorney General