

Opinion No. 71-21

February 15, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Leonard T. Valdes Administrator Social Security Division Public Employees Retirement Association P.E.R.A. Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

Are payments made to employees of the University of New Mexico during period of sickness considered wages and therefore reportable for Social Security purposes?

CONCLUSION

Yes.

OPINION

{*34} ANALYSIS

Social Security coverage extends to employees of this State and of its political subdivisions. Section 5-7-1, N.M.S.A., 1953 Comp. Under the Social Security Coverage Act, Sections 5-7-1 to 5-7-9, N.M.S.A., 1953 Comp., the term "political subdivision" in Section 5-7-2(F), **supra**, encompasses state educational institutions such as the University of New Mexico. N.M. Const., Art. XII, Sec. 1; compare reasoning of Opinion of the Attorney General No. 70-27, dated March 13, 1970. For Social Security purposes each political subdivision covered by the act must report wages paid to its employees and make contributions with respect to such wages. Section 5-7-5(C) (1), **supra**.

The act defines "wages" as all remuneration for employment except those payments that do not constitute "wages" within the Federal Insurance Contributions Act, 26 U.S.C. Sec. 3101-3125. Section 5-7-2(A), **supra**. Therefore, unless payments to employees of {*35} the University of New Mexico during periods of sickness are excluded from the F.I.C.A. concept of "wages", the University of New Mexico must report such payments as wages for Social Security purposes. Section 3121 (A) (2) of the F.I.C.A. excludes from the concept of "wages" for F.I.C.A. purposes

"the amount of any payment . . . made to, or on behalf of, an employee . . . under a plan or system established by an employer which makes provision for his employees . . . **on account of** . . . sickness . . ." (Emphasis added)

The State and its political subdivisions may make payments to employees for only those purposes that are authorized by law. The management and control of the University of New Mexico is vested in its Board of Regents. Section 73-25-3, N.M.S.A., 1953 Comp. The Board of Regents is authorized to appoint all employees of the University and to determine their respective salaries. Section 73-25-6, N.M.S.A., 1953 Comp. Although the Board is primarily responsible for the control and management of the University, the Board's authority is bound by statutory and constitutional provisions governing the fiscal affairs of the various branches of state government. Opinion of the Attorney General No. 70-73, dated September 3, 1970. N.M. Const., Art. XII, Sec. 3. Unless the State has authority to make payments to its employees on account of sickness, the Board possesses no such authority.

The State is prohibited from making donations or gifts to its employees. N.M. Const., Art. IX, Sec. 14. Unless the recipient has performed services to the State, any payment to him would be unconstitutional. **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957); **State ex rel. Sena v. Trujillo**, 46 N.M. 361, 129 P. 2d 329 (1942). It must be assumed, therefore, that any payment to an employee during periods of sickness is to be considered as a continuation of his salary payments and not as a donation to him on account of his sickness.

Since 1949 the University of New Mexico has provided that its employees be allowed one and one-fourth days of sick leave for each month of service, which may be accumulated up to thirty days and used whenever necessary. An employee receives full pay while on sick leave. This amount is paid at the employee's regular salary rate until the credits are exhausted. No deductions from the employee's salary are made for these payments.

It can be seen from this system that the payments to an employee during periods of sick leave amount to a continuation of his salary payments rather than a payment on account of his sickness. **Graves v. Gardner**, 280 F. Supp. 666 (D.C.N.Y. 1968).

Payments made to employees of the University of New Mexico during periods of sickness are merely a continuation of salary payments to such individuals and are not excluded from the F.I.C.A. concept of "wages". Therefore, such payments must be reported by the University as wages for Social Security purposes. Compare I.R.C. Reg. Sec. 31.3121 (A) - 1 (G) (1970).

In passing, it should be emphasized that if any state which has entered into an agreement with the Secretary of Health, Education and Welfare pursuant to Section 218 (J) of the Social Security Act, 42 U.S.C., Sec. 304, does not report wages paid its employees or make contributions with respect to such wages, the Secretary of Health, Education and Welfare may deduct the amounts of such unpaid contributions plus interest from any amounts certified by him to the Secretary of the Treasury for payments to the State under the Social Security Act. 20 C.F.R. Sec. 404.1127 (1970). This State has entered into such an agreement with the Secretary of Health, Education and Welfare. Section 5-7-3, **supra**. Under this arrangement, it is obvious that the reluctance

of the University of New Mexico to report payments made to its employees during periods of sickness as wages and to make contributions with respect to such wages for Social Security purposes jeopardizes all Social Security payments to this State.

By: James C. Compton, Jr.

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