

Opinion No. 72-33

July 12, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Ronald Van Amberg,
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QUESTIONS

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May a public school system permit their teachers to take unearned sick leave with pay?

CONCLUSION

No.

OPINION

{*57} ANALYSIS

The answer to this question involves an analysis of Article IX, Section 14 of the New Mexico State Constitution and Section 40-A-23-2, N.M.S.A., 1953 Comp.

Article IX, Section 14, **supra**, provides:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; Provided, nothing herein shall be construed to prohibit {*58} the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

A "donation" has been defined in New Mexico as a "voluntary transfer" (**Sanchez v. Board of Education of Belen**, 80 N.M. 286, 454 P.2d 768 (1969)), and as an allocation of something of value without consideration (**State v. New Mexico State Authority**, 76 N.M. 1, 411 P.2d 284 (1966)). Also, New Mexico cases consider whether the transfer of funds takes on the character of a donation in substance and effect (**State v. New Mexico State Authority, supra**).

In the instant case, if a teacher is contractually obligated to repay the unearned sick leave pay, then this arrangement would constitute a loan agreement and not a donation, and would not violate the Constitution. Conversely, if a teacher is not obligated to repay

the unearned sick leave pay, then this would be a "donation" and would violate the above constitutional provision.

Section 40A-23-2, N.M.S.A., 1953 Comp. provides in pertinent part:

" **Paying or receiving public money for services not rendered.** -- Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services which have not in fact been rendered."

Payment of wages during sick leave must be made in consideration of services performed (40A-23-2, **supra**). If such payments are made before the services are performed, then it is the opinion of this office that this would be a payment of "public money for services not rendered" and would violate this section.

Section 40A-23-2, **supra**, provides further:

"Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes."

This paragraph does not change the above conclusion. The word "remuneration" is defined as payment for services performed. See **Warner Co. v. Unemployment Compensation Board of Review**, 153 A.2d 906 (1959). Since payment of State funds for unearned sick leave would not be a payment for services performed, it could not constitute a "remuneration" and would not fall within the provisions of this paragraph. Accordingly, such an advance would still violate Section 40A-23-2, **supra**.

While this office is aware that every extra benefit afforded teachers improves the possibility of attracting competent and dedicated professionals into the field of education, nevertheless, we are compelled to follow the laws of New Mexico.