

## Opinion No. 72-67

December 4, 1972

**BY:** OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Alfonso T. Montoya, New Mexico State Senator, Rancho de Placitas, Placitas, New Mexico

### QUESTIONS

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Does it violate any statute or constitutional provision for a state employee to be granted educational leave with pay to attend the University of New Mexico Program for Advanced Study in Public Science Policy and Administration?

#### CONCLUSION

Not if it is granted in accordance with State Personnel Board Rule 402.6 for classified personnel, or if the same requirements are met for nonclassified personnel.

### OPINION

#### {\*109} ANALYSIS

On June 24, 1971 Governor Bruce King issued a memorandum to all agency heads concerning a University of New Mexico program for "Advanced Study in Public Science and Administration." He noted that the program is "a full-time, nine month course of study resulting in a Master's degree in Public Administration for successful candidates." The Governor also advised that the University had reserved two spaces for New Mexico state employees in a class to begin on August 30, 1971. The Governor's memorandum stated:

"Qualified state employees who are accepted would receive free text-books and tuition **while remaining on agency payrolls** at their current salaries in educational leave status." (Emphasis added)

The constitutional provisions relevant to an answer to your inquiry are Article IX, Section 14 and Article XX, {\*110} Section 19, New Mexico Constitution, the latter being one that you specifically mentioned. It provides as follows:

"Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof."

Our Supreme Court has held that this provision is not self-executing, i.e., implementing legislation is necessary. **Jaramillo v. City of Albuquerque**, 64 N.M. 427, 329 P.2d 626; And see Attorney General Opinion 67-89. The required legislation came with the adoption of the State Personnel Act in 1961. Section 5-4-36, N.M.S.A., 1953 Comp., a portion of that Act, provides that State Personnel Board rules **shall** provide for: "G. hours of work, holidays and leave . . ." The Board has done this by adopting, among others, Rules 804.1 and 804.2, the first of which provides in pertinent part that "In all cases, however, a normal day's work should consist of eight (8) hours for all agencies," and the latter providing that "No incumbent shall be paid unless he is working or on **authorized paid leave.**"

Educational leave is dealt with in Rule 402.6 which provides, in its entirety, as follows:

"Educational Leave -- An appointing authority may grant a permanent employee educational leave **with or without pay** for a period not to exceed two (2) years. Educational leave is exclusively to permit an employee to enroll in a course of **study or training related to his work, and which will improve the quality of his service to the state.** An employee on educational leave **with pay shall agree in writing to return to the agency when the leave expires**, and to remain for a period of time agreed upon by the appointing authority. Educational leave without pay shall be governed by Section 402.3, except that the maximum period shall be two (2) years." (Emphasis added)

This brings us to the more critical constitutional provision, the anti-donation restriction -- Article IX, Section 14, which reads in pertinent part as follows:

"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 . . ." (Emphasis added)

There is also a statutory provision that bears on the question, namely, Section 40A-23-2, N.M.S.A., 1953 Comp., which reads as follows:

"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.

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.** (Emphasis added)

Educational leave with pay is "for other lawfully authorized purposes" so long as State Personnel Board Rule 402.6 adopted pursuant to the legislative mandate contained in

Section 5-4-36, **supra**, does not run afoul of the previously quoted constitutional antidonation provision (Article IX, Section 14).

What the issue really boils down to is whether the salaries paid to employees on authorized educational leave amount to a gift or donation, or whether the state will receive, or **reasonably** expect to receive, full value for the money paid. State Personnel Board Rule 402.6 recognizes this fact by requiring that while on educational leave the employee must be enrolled "in a course of study or training related to his work, and which will improve the quality of his service to the state." It also requires that if the leave is with pay the employee agrees to return to the state agency for an agreed period of time.

The Chief Executive of the state certainly {*\*111*} expects that there will be value received from the Program for Advanced Study in Public Science Policy and Administration since he notes in his memorandum that the Program would provide state agency directors with an "excellent opportunity to professionalize their administrative staffs" and "to benefit their agencies."

This office dealt with a similar situation in Attorney General Opinion 63-126, issued September 23, 1963. The question posed was as follows:

"May the New Mexico Boys' School properly send one of the employees of the institution to the State of Washington for a period of one month for indoctrination in the duties of a Youth Forestry Camp Director so that such employee may assist the New Mexico Boys' School in managing a forestry camp for boys established in New Mexico?"

Our conclusion was in the affirmative for the following reason:

"It is evident that in such case a direct benefit would result to the state by reason of the individual's obtaining from another state a familiarity and acquaintance with the methods of operating a boys' forestry camp and obtaining ideas for resolving many of the problems inherent to such forestry camps. Since a direct benefit will issue to the State of New Mexico from such individual's training, the payment of travel expenses, regular salary, and per diem would not constitute a donation prohibited by Article IX, Section 14, of the State Constitution, and in our opinion, such training indoctrination would not contravene any state law."

There is no question but that an outright gift by the state to persons who are neither sick nor indigent violates Article IX, Section 14, **supra**. **State v. Hannah**, 63 N.M. 110, 314 P.2d 714. The terms "outright gift, donation or gratuity" were also used in **State v. Axtell**, 74 N.M. 339, 393 P.2d 451. That is the key to the anti-donation provision -- is the expenditure simply a giveaway?

If the educational leave with pay requirements in State Personnel Board Rule 402.6 are met, the presumption is that the state will receive full value for its expenditures. If the state employee fails to fulfill his agreement to return to employment with his agency for

a reasonable, specified time period, he is liable for all public funds paid to him while on educational leave. See **State v. Axtell, supra**. Accordingly, we conclude the provision for educational leave does not violate the constitutional anti-donation provision or any existing statutory enactment.