Opinion No. 73-34

March 29, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Harry Wugalter Chief, Public School Finance Division Department of Finance & Administration 433 Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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Is it proper for a school board to consider "maternity leave" as sick leave and thereby pay an employee for absence due to "maternity leave" up to the amount of accumulated sick leave?

CONCLUSION

Yes, but see analysis.

OPINION

*{*69}* **ANALYSIS**

Section 40A-23-2, N.M.S.A., 1953 Comp. is relevant to this question. It states:

"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.

"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.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony." (Emphasis added)

Obviously, continued payment during sick leave is not payment of public money for services not rendered, even though no services are rendered during the time the employee is absent from work because sick leave is part of the compensation for services which were rendered before the sick leave is taken. We note that in the above question, no reference is made to "maternity leave" as separate from sick leave. Each

employee is entitled to only that sick leave which she has accumulated, and a pregnant employee would receive payment during "maternity leave" only to the extent of her accumulated sick leave. See Attorney General Opinion No. 72-33, dated July 12, 1972. Therefore Section 40A-23-2, **supra,** is not violated if the school board allows an employee to use sick leave for maternity purposes. We see no reason to prohibit an employee from using her sick leave for maternity purposes. Such a prohibitive policy would discriminate against pregnant employees in the area of employment benefits. Article IX, Section 14, New Mexico Constitution, should be distinguished on the same basis as Section 40A-23-2, **supra.**

Recent cases have specifically prohibited such discriminatory practices. In **Bravo v. Board of Education of City of Chicago,** 345 F. Supp. 155 (N.D. Ill. 1972), the facts were that teachers on illness leave were allowed to draw pay for their accrued sick pay days, but pregnant teachers were not. There appeared to be no reason for differences in benefits between teachers who are ill and those who are pregnant. The court held that there was no rational and substantial basis for a distinction between pregnancy and other medical conditions for purposes of determining benefits. The Court stated:

"The Board already has the administrative machinery to deal with leaves granted due to illness. Because of the similarity of the practical consequences of pregnancy and those of illnesses which require that a teacher be absent from her work, it appears that these administrative procedures can readily be adapted to pregnancy cases as well."

The Board was ordered to treat *{*70}* maternity leave as leave due to illness.

In **Cohen v. Chesterfield County School Bd.,** 326 F. Supp. 1159 (E.D. Va. 1971) the Court stated:

"The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment."

We note that the State Personnel Office in Memorandum No. 65-60 dated April 24, 1972 interpreted sick leave to include leave for maternity purposes. Thought not controlling on school boards, this should serve as the example of proper policy in this area.

Therefore, we are of the opinion that an employee should be allowed to use sick leave for maternity purposes. Since this sick leave may be taken only to the extent earned, Section 40A-23-2, **supra,** is not violated.

Your letter refers to maternity leave granted as sick leave when the employee is still capable of performing. In other words, what about the pregnant teacher who takes sick

leave even though not at all sick from her pregnancy or otherwise; what are "maternity purposes?" Leave taken for maternity purposes should be treated in the very same manner as sick leave taken for any other purpose. If the school board has a policy regarding sick leave that is taken for purposes other than actual illness, then it should apply equally to leave taken for maternity purposes. In other words, we see no reason for a pregnant teacher to be able to take sick leave merely because she is pregnant just as we see no reason for any other employee to be able to take sick leave just because the employee wants a day of vacation. Equal application of sick leave policies must be to the benefit of **all** employees. As an example of such a policy, we again refer to State Personnel Board Rules; Rule 402.2 c. states:

"The appointing authority may require an incumbent to furnish a certificate from an attending physician for sick leave. When circumstances seem to warrant an investigation of any case of absence due to illness, the appointing authority may take such action."

Again we emphasize that such a rule should apply to sick leave taken for **any** purpose.

Pregnancy in itself is not an illness requiring application of sick leave. Each case will differ with the physical condition of the pregnant teacher. For this reason, no exact definition of "maternity purposes" can be formulated. Communication with the physician of the pregnant teacher is advisable, and in every case illnesses associated with pregnancy, impending delivery, delivery, and recovery are maternity purposes which warrant application of sick leave.

There should be no need for a time limit on leave taken for maternity purposes since the limits on sick leave should be applicable. We conclude that all policies on sick leave should be equally applied to leave for maternity purposes.

By: Jane E. Pendleton

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