Opinion No. 77-08

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OPINION OF: Toney Anaya, Attorney General

BY: Jill Z. Cooper, Assistant Attorney General

TO: Representative William E. Warren, Chairman, Legislative School Study Committee, 327 State Capitol Building, Santa Fe, New Mexico 87503

SICK LEAVE COMPENSATION-ARTICLE IV, SECTION 27-ARTICLE IV, SECTION 31-ARTICLE IX, SECTION 14.-A compensation plan which provides benefits on retirement for unused sick leave for public school employees is not unconstitutional.

QUESTIONS

Is it constitutional for a local school board to provide as part of its compensation plan, a benefit that allows districts to pay retiring employees for unused sick leave days?

CONCLUSIONS

Yes, but see Analysis.

ANALYSIS

The authority to determine a compensation plan for employees of a school district is given to local school boards under Section 77-4-2, NMSA 1953 Comp. which provides that a local school board shall "fix the salaries of all employees and certified school personnel of the school district." This authority, however, is subject to such legislative direction as requiring that all certified school personnel be paid at least once a month (Section 77-8-4, NMSA 1953 Comp.); that contracts with certified personnel covering compensation be on forms approved by the state board (Section 77-8-8, NMSA 1953 *{*97}* Comp.); and, generally, that local boards comply with budgeting regulations prescribed by the public school finance division of the department of finance and administration (Section 77-6-5, NMSA 1953 Comp.). The legislature has also provided that retirement benefits for employees of local school districts be subject to the Educational Retirement Act (Sections 77-9-1 to 77-9-45, NMSA 1953 Comp.).

OPINION

As optional measures, the legislature has authorized voluntary participation in a group insurance plan (Section 5-4-12, NMSA 1953 Comp.); and a sabbatical leave program which may be adopted as part of a plan of compensation (Sections 77-8-20 to 77-8-24, NMSA 1953 Comp.). Similarly, the legislation in question here would authorize local boards to adopt a sick leave benefit program as part of its plan of compensation.

Viewed thus, as part of the plan of compensation, the proposed legislation would not necessarily violate the various applicable provisions of the New Mexico State Constitution.

Article IV, Section 27 provides that no law shall be enacted giving any extra compensation to public servants after the services are rendered. The New Mexico Supreme Court has applied a kind of contract rationale to cases arising under Article IV, Section 27. For example, in State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942), the court held that persons who had retired prior to the adoption of a pension plan were precluded from participating in the benefits of the plan. For those employees, there was no contractual agreement relating the services rendered and the benefit to be received. And, in State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954), the court held that increased annuity benefits could be paid qualified annuitants if those persons paid an additional lump sum into the program. The court reasoned that since a right to receive benefits was already established, the State and those wishing to make voluntary contributions could contract for increased benefits.

Applying this rationale here, it would appear that a sick leave benefit plan established by contract as part of the compensation for services rendered would not violate Article IV, Section 27. We would note, for your information, that this office has concluded that such violation would occur if employees receive retroactive pay increases, see Opinion of the Attorney General No. 71-7, dated January 25, 1971; if employees receive discounts in the form of adjustments at the end of a pay period, see Opinion of the Attorney General No. 70-39, dated April 14, 1970; and if employees were given an additional per diem fee, see Opinion of the Attorney General No. 69-134, dated November 21, 1969.

Article IV, Section 31 would prohibit any appropriation for charitable, educational or other benevolent purposes to any person not under the absolute control of the State. However, as the court explained in State ex rel. Sena v. Trujillo, 46 N.M. at 368, if the basis for the program is neither charitable nor benevolent but rather compensation for services rendered, then the prohibition of Article IV, Section 31 would not apply.

*{*98}* Article IX, Section 14 would prohibit a school district from making any donation to or in aid of any person. The New Mexico Supreme Court in Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920 (1956) has defined a donation as a gift, "an allocation or appropriation of something of value, without consideration." Again, if the benefit is bargained for compensation in consideration for services rendered, it would not constitute a gift in violation of Article IX, Section 14.

We would conclude, therefore, that to the extent that the proposed legislation would authorize local school districts to adopt a sick leave benefit program as part of a plan of compensation, it would not be unconstitutional. Under such a plan, the situation would be different from that considered in Opinion of the Attorney General No. 72-33 dated July 12, 1972, in which this office concluded that a school district could not permit its teachers to take unearned sick leave with pay on the grounds that such unearned sick

leave pay would constitute a donation in violation of Article IX, Section 14 and would be contrary to Section 40A-23-2, NMSA 1953 Comp.

Finally, we would note that the state, unlike school districts, provides for both annual leave time and sick leave time. A state employee may, on retirement, receive compensation in lieu of unused accumulated annual leave but not for unused accumulated sick leave. See State Personnel Board Rules, No. 402.1(b). See also Opinion of the Attorney General No. 64-155, dated December 28, 1964.

ATTORNEY GENERAL

Toney Anaya, Attorney General