

## **Opinion No. 77-18**

June 7, 1977

**OPINION OF:** Toney Anaya, Attorney General

**BY:** Jill Z. Cooper, Assistant Attorney General

**TO:** Harry Wugalter, Chief, Public School Finance Division, Department of Finance and Administration, Capital Building, Santa Fe, New Mexico 87503

**SICK LEAVE BENEFITS; RETIREMENT; SCHOOLS; TEACHER COMPENSATION-**  
School districts may contract with employees to pay, as part of a plan of compensation, a benefit at retirement for accumulated unused sick leave.

### **QUESTIONS**

1. In the absence of any statutory authority, may a local school board pay retirees accrued sick leave benefits as part of a plan of compensation?
2. If so, may such benefits be made retroactive?

### **CONCLUSIONS**

1. Yes
2. No.

### **ANALYSIS**

In Opinion of the Attorney General No. 77-8, dated February 17, 1977, this office concluded that the Constitution would not prohibit legislation authorizing local school boards to devise a plan of compensation which would include the payment of benefits to retiring employees for accumulated, unused {\*126} sick leave. As explained in that Opinion, the various prohibitions contained in Article 4, Section 27; Article 4, Section 31; and Article 9, Section 14 of the New Mexico Constitution would not be violated so long as the benefit was, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. The legislature, however, rejected bills which would have provided such specific legislative authorization and the question here is whether or not local boards may, absent specific legislative authorization, include benefits for unused sick leave as part of a plan of compensation.

### **OPINION**

It is clear that the legislature has authorized local school boards to fix the salaries of all employees. See Section 77-4-2, NMSA, 1953 Comp. The legislature has, however, imposed certain conditions upon a board's exercise of that authority. For example, the law requires that all certified school personnel be paid at least once a month (Section 77-8-4, NMSA, 1953 Comp.); that contracts for certified personnel covering compensation be on forms approved by the State Board of Education (Section 77-8-8, NMSA, 1953 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.).

Local boards have no authority with respect to the payment of retirement benefits. Those benefits are administered pursuant to the Educational Retirement Act, Sections 77-9-1 to 77-9-45 NMSA 1953 Comp., which was enacted to cover all school personnel. Section 77-9-16, supra, makes regular membership in the program a condition of employment and excludes membership in any other retirement program. Section 77-9-20, supra, specifies the amount of annual contribution to be made by the employee and by the school board.

Local boards have been granted specific legislative authorization to participate in certain optional benefit programs for employees. For example, the legislature has authorized school boards to contribute up to sixty percent of the cost of group term life, medical or disability income insurance for their employees. Section 5-4-12, NMSA, 1953 Comp. The legislature has likewise authorized school boards to provide, as part of a plan of compensation, a sabbatical leave program for certified school personnel, subject to legislatively defined minimum standards and monetary limits. Sections 77-8-20 to 77-8-24, NMSA, 1953 Comp. Presumably, the unused sick leave benefit program would be such an optional plan.

Generally, then, school boards have the authority to fix salaries and determine the form of compensation for school personnel subject to certain legislative conditions. The legislature has denied that authority with respect to the payment of retirement benefits; but it has given specific additional authority for certain optional benefit programs.

Given this general structure, it would appear that the unused sick leave program, as an optional benefit, should be specifically authorized by the legislature. We find, however, no law which would require such specific authorization and the existence of specific authorization for some optional {*\*127*} programs does not necessarily evince a legislative intent to require it in every case. Rather, we find that the specific authorization given for the insurance and sabbatical leave programs appears to be required by other statutory considerations.

Section 5-4-12, supra, authorizing the insurance program was enacted to repeal "all acts or parts of acts in conflict herewith" as well as to establish limitations on contributions. Laws 1941, Chapter 188. Sections 77-8-20 to 77-8-24, supra, authorizing the sabbatical leave program, was apparently enacted pursuant to Section 40A-23-2,

NMSA, 1953 Comp. which prohibits paying public moneys for services not rendered, but which further provides that:

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.

Section 77-8-20, et seq., supra, would define the requisite lawfully authorized purpose.

It has been held that under a general grant of authority to a school board to make expenditures for certain purposes, no further legislative direction is required for expenditures which are in furtherance of those purposes. *Nohl v. Board of Education*, 27 N.M. 232, 199 P. 373 (1921). In that case, the court considered the legality of a local board of education paying group life insurance for teachers pursuant to a statute which gave boards the authority to defray all expenses connected with the proper conduct of the public schools. The court upheld the expenditure and found that it could not interfere with

. . . the discretion entrusted to boards of education under the statute, unless it plainly appears that there has been a gross abuse of such discretion, and that the funds are being spent for purposes and objects which have no relationship to schools. 27 N.M. at 237.

Therefore, so long as there is no abuse of the authority granted the local boards to fix salaries, and so long as there is compliance with the relevant statutes and regulations, the absence of specific statutory authority would not, in itself, preclude local boards from dispensing unused sick leave benefits to retirees as part of a plan of compensation.

In any case, if a school board chooses to adopt, as part of a plan of compensation, benefits for unused accumulated sick leave, those benefits cannot be provided retroactively. Article IV, Section 27 of the New Mexico Constitution provides that no law shall be enacted giving any extra compensation to public employees after services are rendered. In *State ex rel. Sena v. Trujillo*, 46 N.M. 361, 129 P.2d 329 (1942), the Court applied this provision to hold that persons who had retired prior to the adoption of a pension plan were precluded from participating in the benefits of the plan. In addition, this {\*128} office has previously concluded that Article IV, Section 27 would prohibit retroactive pay increases for services which have already been rendered. See Opinion of the Attorney General No. 7-17, dated January 25, 1971, and Opinion of the Attorney General No. 57-17, dated February 7, 1957.

Article IX, Section 14 prohibits school districts from making any donation to or in aid of any person. A "donation" has been defined as a gift, "an allocation or appropriation of something of value without consideration." *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956). Retroactive sick leave benefits would, accordingly,

constitute an illegal donation as they would not be paid in consideration for services rendered.

Thus, in order to avoid constitutional prohibitions, accumulated unused sick leave benefits must be paid pursuant to contract as bargained for consideration in return for services rendered. Only unused sick leave accrued after such a contract is in effect would be applicable to the benefit.

**ATTORNEY GENERAL**

Toney Anaya, Attorney General