Opinion No. 88-23

April 22, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Carlos A. Gallegos, Executive Secretary, Public Employees Retirement Association, P.O. Box 2123, Santa Fe, NM 87504-2123

QUESTIONS

1. Whether Albuquerque's workers' compensation benefit payments to employees are "salary," as defined by Section 10-11-2(P) NMSA 1978?

2. Whether Albuquerque's payments to employees of the difference between their pre-injury salary and their workers' compensation benefits are "salary," as defined by Section 10-11-2(P) NMSA 1978?

3. Whether Albuquerque's compensatory time payments to retiring police employees are "salary," as defined by Section 10-11-2(P) NMSA 1978?

4. Whether unused sick leave that is converted to unused annual leave and paid as a lump sum is "salary," as defined by Section 10-11-2(P) NMSA 1978?

5. Whether PERA may calculate a retiree's benefits by including a lump sum annual leave payment for 586.56 hours where that retiree was covered under the Albuquerque Police Officers' Association's collective bargaining agreement with the City, that permitted cash compensation upon termination for "any" unused vacation?

CONCLUSIONS

1. No.

2. No.

3. No.

4. No.

5. No.

ANALYSIS

The Public Employees Retirement Board requests our advice about its audit of the City of Albuquerque. That audit's findings are contained in Mr. Carlos A. Gallegos' memorandum to the Board dated January 25, 1988. The audit raises the questions depicted.

Section 10-11-2(P) NMSA 1978 defines "salary" as:

[T]he base salary or wages paid a member, including longevity pay, for personal services rendered an affiliated public employer. Salary shall not include overtime pay, allowances for housing, clothing, equipment or travel, payments for unused sick leave unless the unused sick leave is made through continuation of the member on the regular payroll for the period represented by that payment and any other form of remuneration not specifically designated by law as included in salary for Public Employees Retirement Act purposes.

1. We assume that Albuquerque pays workers' compensation benefits to its injured employees, because it has satisfied the workers' compensation division, pursuant to Section 52-1-4 NMSA 1978, that it is financially solvent and that insurance coverage is unnecessary. The workers' compensation act, Sections 52-1-1 to 52-1-70 NMSA 1978, expresses the policy of this state:

[E]mployees who suffer disablement as a result of injuries causally connected to their work, shall not become dependent upon the welfare programs of the State, ... [citation omitted], but shall receive some portion of the wages they would have earned, had it not been for the intervening disability ... [citation omitted].

Casias v. Zia Co., 93 N.M. 78, 80, 596 P.2d 521, 523 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979). The act's purpose is "to ensure that industry carry the burden of personal injuries suffered by workers in the course of their employment." **Superintendent of Ins. v. Mountain States Mutual Casualty Co.,** 104 N.M. 605, 607, 725 P.2d 581, 583 (Ct. App. 1986). The act is exclusive, and the worker may not bring an action in negligence against his employer. **Galles Chevrolet Co. v. Chaney,** 92 N.M. 618, 620, 593 P.2d 59, 61 (1979). In **Roybal v. County of Santa Fe,** 79 N.M. 99, 102, 440 P.2d 291, 294 (1968), involving a claimed credit for wages paid against workers' compensation payments due, the Supreme Court of New Mexico distinguished wages from workers' compensation:

"* * * "Compensation' of an employee in the form of wages or salary for services performed, does not have the same meaning as the word "compensation' in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained. * * *" **Hawthorn v. City of Beverly Hills,** 111 Cal. App.2d 723, 245 P.2d 352 (1952).

Worker's compensation benefits are not "wages paid for personal services rendered," but rather are benefits to compensate the injured employee for a portion of those wages he might have earned but for his injury during the course of his employment. Thus, the

benefits are not "salary" for purposes of Section 10-11-2(P). These benefits would not be "salary" if paid by an insurance company and are no more so because Albuquerque pays them as a self-insurer. The Public Employees Retirement Association ("PERA") must refund contributions paid upon these benefits; cancel service credit for the period during which the worker received benefits; recalculate retirement benefits to exclude service credit and any salary for this period of time; and recover overpayments of retirement benefits.

2. Albuqerque pays injury time to employees injured in the course of employment who receive weekly workers' compensation benefits. Injury time payments may not exceed the difference between the workers' compensation benefits and the employee's regular pay, and they may be reduced by cash workers' compensation awards. Albuquerque may sue in its own name or in the name of the employee to collect the amount of injury-time payments from third parties that injured the employee. See Albuquerque's ordinance, article IX, entitled "Merit System," section 2-9-16, hereinafter referred to as "Merit System Ordinance." These injury-time payments are not "wages paid for personal services rendered" within the meaning of Section 10-11-2(P). Fringe benefits, such as these payments, generally are not included in "salary" for retirement purposes. See **Lugar v. State ex rel. Lee,** 176 Ind. App. 103, 383 N.E.2d 287 (1978) (excluding clothing allowance because such allowance is not paid in exchange for services); **Hilligoss v. LaDow,** 174 Ind. App. 520, 368 N.E.2d 1365, appeal dismissed, 436 U.S. 942 (1978) (excluding health insurance payments and clothing allowance); **Hay v. City of Highland Park,** 134 Mich. App. 624, 351 N.W.2d 622 (1984) (excluding fringe benefits such as holiday pay, call-back pay, terminal leave pay, premium payments for health, eye care and dental insurance); **Banish v. Hamtramck,** 9 Mich. App. 381, 157 N.W.2d 445 (1968) (excluding uniform allowance); **Hill v. City of Lincoln,** 213 Neb. 517, 330 N.W.2d 471 (1983) (excluding holiday pay, college pay and overtime). Fringe benefits, i.e., those items that do not increase a member's regular wages, are excluded, because "salary," for retirement act purposes, means a member's fixed, periodic compensation for services. Section 10-11-2(P) NMSA 1978. See **Hestand v. Erke,** 227 Ark. 309, 311, 298 S.W.2d 44, 47 (1957) (excluding payments for extra work in last three months before retirement); **State ex rel. King v. Abbott,** 48 A.2d 745, 746 (Del. 1946); **Hilligoss v. LaDow,** 174 Ind. App. at 530, 368 N.E.2d at 1371; **Policeman's and Fireman's Retirement Fund of Ashland v. Richardson,** 522 S.W.2d 452, 452 (Ky. App. 1975); **People v. Lay,** 193 Mich. 476, 488, 160 N.W. 467, 471 (1916); **Beach v. Kent,** 142 Mich. 347, 356, 105 N.W. 867, 870 (1905); **Hill v. City of Lincoln,** 213 Neb. at 522, 330 N.W.2d at 474; **Borough of Beaver v. Liston,** 464 A.2d 679, 682 (Pa. Cmwlth. 1983). See also PERA Rule 100.00(D): ""'Salary' means a member's fixed, periodical compensation."

Section 10-11-2(P)'s exclusion of overtime, clothing and other allowances evidences legislative intent to exclude fringe benefits. Accordingly, PERA must refund contributions paid upon these injury-time payments; cancel service credit for the period during which the worker received these payments; recalculate retirement benefits to exclude service credit and any salary for this period of time; and recover overpayments of retirement benefits.

3. Albuquerque pays retiring police employees a cash payment for compensatory time. The current Albuquerque Police Officers' Association's collective bargaining agreement with the City of Albuquerque provides, at section 31, entitled "Compensatory Time":

Time worked over 40 hours per week will be compensated at 1 times the officer's regular rate of pay or in the form of compensatory time. Compensatory time will be computed at the rate of 1 time the hours actually worked. The maximum accrual of comp. time for any officer is 150 hours. Upon separation of employment from the Albuquerque Police Department, an officer is limited to a cash out of no more than 40 hours of unused comp time at straight time pay. Any accrual of comp time over 40 hours must be used 6 months prior to separation.

Comp. time payments are the equivalent of overtime payments, because the employee is paid for working more time than he is expected to work. See **Rose v. City of Hayward,** 126 Cal. App. 3d 926, 179 Cal. Rptr. 287 (1982) (excluding lump sum annual and sick leave, finding those items to be analogous to overtime pay); **Borough of Beaver v. Liston,** 464 A.2d at 682 (excluding overtime, because it is paid irregularly and in varying amounts); **Santa Monica Police Officer's Ass'n. v. Board of Admin.,** 69 Cal. App. 3d 96, 137 Cal. Rptr. 771 (1977) (excluding lump sum sick and annual leave; finding the leave to be analogous to overtime, because it represents payment to the employee when he has worked more time than expected); **State ex rel. Murray v. Riley,** 62 A.2d 236 (Del. 1948) (excluding pay given for working on days off). Section 10-11-2(P) expressly excludes overtime payments. And Albuquerque's cash payments to retiring employees for compensatory time are not part of the regular, periodic wages of those employees. Hence, they are not "salary" for purposes of Section 10-11-2(P). PERA must refund contributions attributable to this item; exclude this item from benefit calculation; recalculate benefits to exclude this item from salary; and recover overpayments of retirement benefits.

4. We have advised PERA previously to exclude from "salary" unused sick leave that is converted to annual leave to calculate a retiring member's pension. Since then, the Public Employees' Retirement Board instructed its staff to recalculate retiring members' benefits, whose benefits were before the Board for ratification, to exclude from salary amounts representing lump sum sick leave. Section 10-11-2(P) expressly excludes payments for unused sick leave. PERA Rule 100.00(D) states: ""[S]alary' does not include ... lump sum ... sick leave." See also **Michigan State Police v. Dept. of Public Safety,** 80 Mich. App. 278, 263 N.W.2d 47 (1977) (excluding from salary lump sum sick leave payments); **Civil Serv. Employees Ass'n., Inc. v. Regan,** 94 A.D.2d 148, 463 N.Y.S.2d 920 (1983) (excluding lump sum sick leave). Payments for unused sick leave, whether converted to annual leave or not, are not "salary" as defined by Section 10-11-2(P).[1]

PERA must refund contributions attributable to this item; exclude this item from benefit calculation; recalculate benefits to exclude this item from salary; and recover overpayments of retirement benefits.

5. Former Albuquerque police officer Malcolm L. "Larry" Ward retired in 1986. PERA calculated Mr. Ward's benefits to include 586.56 hours of annual leave paid to him upon termination of employment. The PERA rule that the Board has voted to continue, contrary to this Office's advice, recognizes as "salary" only those hours of accumulated annual leave that the employee's public employer permitted the employee to accumulate as of July 1, 1982. See PERA rule 100.00(D), adopted July 2, 1982.

Albuquerque's Merit System Ordinance, in effect on July 1, 1982, and in effect now, provides, at section 2-9-14:

B. Vacation leave will accrue as follows:

Continuous Service	Reg. Work Week	Accrual Per Year	Accrual Month
. . .			
More than 15 yrs:	40 hrs	13 1/3 hrs	160 hrs
	56 hrs	18 2/3 hrs	224 hrs

D. Vacation accumulation will be computed as of December 31 each year, and the excess over 24 monthly accruals will be dropped from the record.[2]

This Merit System Ordinance also provides, at section 2-9-26:

[W]here a collective bargaining agreement... conflicts with a provision of this Ordinance, the collective bargaining agreement shall ... govern over such provision of this ordinance unless it is one establishing:

A. Classified and unclassified service; B. Methods of service rating of unclassified employees; C. Methods of initial employment, promotion, recognizing efficiency and ability as the applicable standards, and discharge of employees; or D. Appropriate grievance and appeal procedures for classified employees.

Albuquerque's Labor-Management Relations Ordinance, article II, at section 2-2-15, recites the same exceptions, and further states: "Other provisions of the Merit System Ordinance, where they do not conflict with ... a collective bargaining agreement ... shall be administered in conjunction with this ordinance." These exceptions do not mention vacation accrual.

The Albuquerque Public Officers' Association's collective bargaining agreement in effect in 1982 and subsequent thereto permits an officer to accrue, monthly and yearly, the same amount of annual leave (20 days a year where service is over 15 years) that the Merit System Ordinance specifies. However, this agreement states: "Employees shall

be compensated in cash at their regular rate of pay for any unused accumulation of vacation when they are permanently separated from the City." The Merit System Ordinance permits the City to compensate its employees for accrued vacation as may be provided for in the City's personnel rules; those rules, in effect in 1982 and currently, permit compensation for unused vacation "not to exceed twenty-four monthly accruals." See Albuquerque's personnel regulations, at section 412. This limitation, however, is not significant to the issue at hand, because Rule 100.00(D)'s focus is on the ability to accrue annual leave.

The police officers' agreement and the Merit System Ordinance do not conflict about an officer's ability to accrue annual leave. The Ordinance requires the City to reduce an officer's excess accumulated annual leave to 320 hours on December 31 of each year. The collective bargaining agreement is silent on this question, but does not suggest that an officer accrues unlimited or a different amount of annual leave. Assuming, therefore, that an officer, whose leave the City reduced, took no vacation the following year, the most he could accrue before the next reduction would be 480 hours.

Inter-office correspondence of the City reflects that on or about June 11, 1986, Albuquerque restored to Mr. Ward 160 hours of vacation that he lost on December 31, 1985, because of the reduction to 320 hours. This action resulted in Mr. Ward's accruing and receiving payment for 480 hours vacation, plus vacation hours earned in 1986 before retirement. We find no provision in the collective bargaining agreement, Merit System Ordinance, or the City's personnel rules that authorizes such restoration.

If this restoration is characterized as a retroactive increase in salary, because it represents a cash payment for leave greater than the amount the employer allowed under its employment conditions with the employee, the payment arguably violates article IX, section 14 of the New Mexico Constitution. See Op. Att'y Gen. 57-17 (legislature may not grant retroactive pay increases to state employees for services already rendered); Op. Att'y Gen. 57-308 (no retroactive increase is involved where an employee's November monthly salary is increased but only for services rendered in November); Op. Att'y Gen. 62-28 (monthly salaries of Miners' Hospital employees legally may not be increased effective August 1, 1961, at any date subsequent to August 31, 1961; if retroactive salary increases have been made, the public moneys so paid should be recovered from the recipients); Op. Att'y Gen. 71-7 (department of health and social services may not give retroactive pay increases to state employees); Op. Att'y Gen. 77-18 (local school boards may pay accumulated unused sick leave benefits but only for unused sick leave accrued after the contract providing such benefits is in effect). In **Casale v. Pension Comm'n of Newark,** 78 N.J. Super. 38, 187 A.2d 372 (1963), the court refused to permit retroactive salary increases: "To permit retroactive adjustments in salary to effect a pension increase would create a situation fraught with possibilities of favored treatment, potentially destructive of the orderly administration and financial soundness of a pension system." Id. at 41, 187 A.2d at 373. See also **Green v. Regan,** 103 A.D.2d 878, 478 N.Y.S.2d 115 (1984) (a retiree's final average salary does not include a retroactive pay increase made to a retiring employee as an inducement to retire).

According to PERA rule 100.00(D), PERA must exclude from Mr. Ward's salary for retirement purposes the amount of unused annual leave that Albuquerque paid to him in excess of 426.56 hours (320 hours + 106.56 hours accumulated in 1986), the maximum amount of annual leave that Albuquerque allowed him to accumulate on July 1, 1982, and must recalculate his retirement benefits accordingly. PERA also must recover overpayments of retirement benefits.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Albuquerque's personnel regulations permit an employee to convert all unused sick leave to early retirement leave before retirement. This early retirement leave is leave with pay. In unusual cases, where the City requires the employee's active service, the City may pay a lump sum amount for all or part of the unused sick leave. Employees covered under a collective bargaining agreement are governed by that agreement's provisions. See Albuquerque's Personnel Regulations, sections 414(D) and 433(A). Thus, the sick leave conversion is not to annual leave, but rather to leave with pay or to cash.

n2 Albuquerque's personnel regulations in effect in 1982, and in effect now, recite the same reduction at section 412.