

Opinion No. 89-06

February 15, 1989

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Honorable Tito D. Chavez, State Senator, 3424 Mateo Prado NW, Albuquerque, New Mexico 87107

QUESTIONS

1. May a Bernalillo County employee direct the County to convert accumulated sick leave to annual leave in the event of his death during employment?
2. Would such conversion, if allowed, affect any benefits payable by the Public Employees' Retirement Association upon the employee's death?

CONCLUSIONS

1. No.
2. No.

ANALYSIS

A Bernalillo County employee executed the following affidavit on December 7, 1988:

...

2. I am making this Affidavit for the purposes of stating my intent to have accumulated sick leave applied to annual leave pursuant to the formula in Rule 709 and 709.1 of the "County of Bernalillo Personnel Rules and Regulations", (appendix adopted July 11, 1978 Board of County Commissioners).
3. If my death should occur during the course of my employment with ... Bernalillo County... it is my intention that the necessary parties are directed to consider this as NOTICE of my retirement from ... Bernalillo County ... and all accumulated sick leave shall be converted to annual leave in accordance with the provision applicable to retirement.

Bernalillo County's personnel rule 709 that was provided to us allows employees to convert accrued sick leave to annual leave in proportional amounts that vary depending on the amount of sick leave accrued. That rule also provides: "No converted sick leave hours shall remain as accrued annual leave from year to year, nor shall such converted

leave be eligible for accumulated annual leave upon termination or resignation from County service." Thus, converted sick leave must be used during the conversion year or it is lost. Converted sick leave is not treated as accumulated annual leave when an employee terminates. Bernalillo County's personnel rule 709.1, as amended March 3, 1987, that was provided to us, provides:

For the purposes of Early Retirement, a regular employee may convert three (3) days of accumulated sick leave to two (2) days of annual leave. Only those employees eligible for retirement under the State Public Employees Retirement Act, at the time of retirement, shall be eligible to convert in three (3) days of sick leave accrued for two (2) days of annual leave (paid early retirement) prior to the actual date of withdrawal or retirement from the County Service. No vacation or sick leave will be accrued when the employee is on converted sick leave to annual leave conversion status.

An employee who dies during employment does not retire. To retire, a member, who terminates employment and meets eligibility requirements, must file an application for retirement, and that member's benefits commence the following month. Section 10-11-8 NMSA 1978 (Repl. 1987). Thus, Rule 709.1 is not applicable to an employee who dies during employment. The employee's affidavit directing that his death be treated as his retirement is ineffectual.

Upon a member's, i.e. employee's, death during employment, Sections 10-11-13 and 10-11-14 NMSA 1978 (Repl. 1987) authorize certain survivor pensions. These pensions are calculated based on the deceased member's "final average salary." This "final average salary" figure may not include lump sum payments for annual leave, sick leave or sick leave converted to annual leave, because such payments are not "salary" within PERA's meaning. PERA Rule 100.00(D) defines "salary", as used in the Public Employees' Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987):

"Salary" means a member's fixed, periodical compensation. "Salary" includes longevity pay and shift differentials. "Salary" also includes wages paid while absent from work on account of vacation, holiday or illness, which means payments made by continuing the member on the regular payroll; "salary" does not include lump sum payments which are not part of the member's fixed periodical compensation such as lump sum annual and sick leave.

Subsection 10-11-2(P) defines "salary":

"salary" means the 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 payment 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 designed by law as included in salary for Public Employees Retirement Act purposes.

(Emphasis added.) **See also** Att'y Gen. Op. 88-23 (1988) (unused sick leave that is converted to unused annual leave and paid as a lump sum is not "salary" as defined by PERA); Attorney General's advisory letter dated June 16, 1982 (Bernalillo County employees may not use sick leave that is converted to annual leave to augment their "final average salaries" under PERA). Accordingly, even if accrued sick leave could be converted to annual leave and paid as a lump sum, this payment will not affect benefits payable upon a member's death during employment.

ATTORNEY GENERAL

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