

Opinion No. 88-73

November 18, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Terran W. Mast, Assistant Attorney General

TO: Dr. Gilbert Delgado, Superintendent, N.M. School for the Deaf, 1060 Cerrillos Road, Santa Fe, NM 87501

QUESTIONS

If the New Mexico School for the Deaf ("NMSD") establishes a sick leave buyback policy that permits retiring employees to receive compensation for accrued sick leave, can the policy be applied to hours of sick leave accrued prior to the implementation of the policy?

CONCLUSIONS

Yes.

ANALYSIS

In Att'y Gen. Op. 77-18 (1977), this Office addressed this question and concluded that a local school board could pay retiring employees for accrued sick leave as part of a plan of compensation, but that it could not compensate them for hours of sick leave accrued before the policy's promulgation date. In reaching this conclusion, this Office relied on State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942), and Att'y Gen. Ops. 71-7 (1971) and 57-17 (1957). After reviewing these same authorities and others, we now reach an opposite conclusion and hereby overrule Att'y Gen. Op. 77-18 (1977) to the extent that it conflicts with this opinion.

In Trujillo, the New Mexico Supreme Court considered whether a newly enacted pension law could be applied to an individual who had left state employment before the enactment date. The court held that such an application would violate Article IV, Sections 27 and 31, and Article IX, Section 14 of the New Mexico Constitution ("the anti-donation clauses").¹ In reaching its conclusion the court noted that "a pension system is an inducement to the able to enter the service of the State, and for an equally good reason it is an inducement to those who have grown old in the service to step down and make way for the more efficient." Id. at 368, 129 P.2d at 333. The court then stated that the act could not be applied legally to the former employee, because "obviously appellee could not have come into the service, stayed in it, nor left it because of the Act...." Id. Implicit in this statement is the notion that if a new law or policy could lead an employee to change or continue his employment status, then the change is bargained for compensation and the Constitution's anti-donation clauses do not prohibit it.

The Supreme Court's subsequent decision in *State ex rel. Hudgins v. Public Employees Retirement Bd.*, 58 N.M. 543, 273 P.2d 743 (1954) supports this interpretation. In *Hudgins*, the court upheld an act that increased retirement benefits for public employees for years of service that they had already performed. The court specifically held that the act did not violate Article IV, sections 27 and 31 or Article IX, section 14. The court distinguished *Trujillo* and stated:

The case of *State ex rel. Sena v. Trujillo*, 46 N.M. 361, 129 P.2d 329, 142 A.L.R. 932, heavily relied on by appellants, has no persuasive force herein. In that case there was no applicable pension system in existence at the time the employee was retired, more than ten years before the passage of the act. The answer to the question whether a pensionable status may be created retroactively to include persons who had already been retired may not afford a guide in resolving the question whether an amendment to the retirement law may afford additional benefits to members who had already acquired a retired annuitant's status under a prior act.

Id. at 548, 273 P.2d 747.

This interpretation is also consistent with the decisions of New Mexico courts which have held that "a statute is not applied retroactively merely because it draws upon antecedent facts for its operation." *Lucero v. Board of Regents*, 91 N.M. 770, 771-72, 581 P.2d 458, 459-60 (1978). Also see *Hansman v. Bernalillo County Assessor*, 95 N.M. 697, 702, 625 P.2d 1214, 1219 (Ct. App. 1980). The proposed buyback plan does not offer an employee additional compensation for previous service. Rather, the plan provides an incentive to employees to use sick leave only when necessary and provides for a determination of future compensation based upon antecedent facts and an employee's success in saving, rather than using, sick leave.

Nothing in *Att'y Gen. Ops. 71-7* (1971) or *57-17* (1957) is to the contrary. These opinions addressed the legality of retroactive pay increases for state employees. A sick leave buyback plan for hours of sick leave previously accrued, in contrast, is compensation for remaining in employment, as shown in *Trujillo*. Accordingly, NMSD may apply a sick leave buyback plan to hours of sick leave that employees have accrued before the policy's promulgation date.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) Article IV, Section 27 provides: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution."

Article IV, Section 31 provides: "No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state...."

Article IX, Section 14 provides:

Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provisions for the care and maintenance of sick and indigent persons....