

N.D.A.G. Letter to McClure (Jan. 15, 1992)

January 15, 1992

Brian McClure, Director
Central Personnel Division
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0120

Dear Mr. McClure:

Thank you for your letter of December 17, 1991, requesting my opinion as to whether county social service boards are now obligated to pay 10 percent of unused sick leave hours to employees who leave the service of county social service boards after 10 continuous years of service. I conclude that county social service boards do not have that obligation.

You indicate that your question is prompted by the fact that employees who work for county social service boards are included in the merit system and regarded as classified employees. You note that N.D.C.C. § 54-42-08 states that all employed personnel having status under the merit system shall have like status and pay under the North Dakota Merit System Council. You note that 1981 N.D. Op. Att'y Gen. 413 expressed a view that county social service boards are required to follow all of the policies describing benefits such as annual leave and sick leave as contained in chapter 5 of the State of North Dakota Personnel Policies Manual.

N.D.C.C. § 54-42-08 was adopted in 1957 when the Legislature replaced the merit system created by agreement of the Public Welfare Board of North Dakota, the North Dakota Unemployment Compensation Division, the North Dakota State Employment Service, and the North Dakota State Department of Health, with the North Dakota Merit System Council. Sections 7 and 8 of 1957 N.D. Sess. Laws ch. 332 provided, respectively, for the transfer of records and other materials, and for the "transfer" of employees, to coverage under the new Merit System Council. A proper understanding of section 8 of 1957 N.D. Sess. Laws ch. 332, now N.D.C.C. § 54-42-08, is that it was intended to assure that persons having status under the merit system, as it existed prior to the passage of the bill, should have the same status and pay under the new North Dakota Merit System Council. That is to say, persons employed in merit system agencies before the effective date of 1957 N.D. Sess. Laws ch. 332 would have the same status and pay after the effective date of that Act. This 35-year-old transition provision did not then and does not now require all merit system employees to have the same status and pay.

County social service boards are required to follow all of the policies describing benefits such as annual leave or sick leave contained in chapter 5 of the State of North Dakota Personnel Policies Manual. 1981 N.D. Op. Att'y Gen. 413. That conclusion was based

upon the provisions of N.D.C.C. § 54-42-03, which then, as now, required that the rules and policies of the Merit System Council be binding upon the agencies affected. However, if the policies and rules of the North Dakota Merit System Council do not require the lump sum sick leave cash-out, then 1981 N.D. Op. Att'y Gen. 413 does not provide an answer to your question. Your letter indicates that the North Dakota Merit System Council policies and rules do not now have such a requirement and that future inclusion of such a requirement is not contemplated.

The provisions of N.D.C.C. § 54-06-14 may, on cursory examination, appear to provide for a lump sum cash-out of accrued sick leave for certain persons who are not state employees. However, the operative language of the statute states: "An employee with at least ten continuous years of state employment is entitled to a lump sum payment equal to one-tenth of the pay attributed to the employee's unused sick leave accrued under this section." (Emphasis added.) Sick leave accrues under section 54-06-14 only to "persons in the permanent employment of this state." The payment for unused sick leave is computed on the basis of the employee's salary or wage "at the time the employee leaves the employ of the state." Thus, the Legislature has unambiguously provided the lump sum sick leave payment applies only to state employees. Employees of county social service boards, though employed under the merit system, are not state employees and are not entitled to a lump sum sick leave payment under N.D.C.C. § 54-06-14.

I hope this responds sufficiently to your inquiry.

Sincerely,

Nicholas J. Spaeth

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