

Opinion No. 58-16

January 21, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Mr. Ben Chavez, State Auditor, Santa Fe, New Mexico

QUESTION

QUESTION 1

Is an employee of the State of New Mexico entitled to annual leave or vacation pay if:

(a) The employee does not take time off but continues to work.

(b) The employee does not take time off but is reclassified and assigned new or different duties within the same agency.

(c) The employee terminates but is rehired by the same department or agency and resumes work before the end of the period covered by the annual leave. Under these circumstances, what period of time is the employee entitled to annual leave or vacation pay?

(d) The employee terminates and is hired by another department or agency and begins work with the other agency before the end of the period covered by annual leave or vacation time. Under these circumstances, what period of time is the employee entitled to for annual leave or vacation time?

QUESTION 2

May an employee of one state agency be employed and paid by a second agency of the State of New Mexico if services for the second agency are performed at a different time and location from that of the first agency?

CONCLUSIONS - QUESTION 1

(a) No.

(b) No.

(c) Only for the actual time between termination and the day the employee returned to work.

(d) For the entire period subject to the restrictions stated in this opinion.

CONCLUSION - QUESTION 2

Yes.

OPINION

ANALYSIS

Before answering the specific questions asked above, we think it necessary to point out that we have no statutory authority covering the subject of annual leave or vacation time. Annual leave or vacation time, however, is authorized and regulated by the New Mexico State Personnel Board created pursuant to Sec. 5-4-1, NMSA, 1953 Comp.

Regulation 9, paragraph 5, of the State of New Mexico Personnel Regulations, promulgated by the New Mexico Personnel Board, in regard to annual leave or vacation time states as follows:

"Each permanent or probationary employee shall be entitled to annual leave with full pay computed on the basis of one and one-fourth days for each complete calendar month of service, except that annual leave shall not accrue to any employee while on a leave-without-pay status. Such annual leave shall be cumulative for not more than 30 days. **Accumulated annual leave will be granted upon written application of the employee, except in the case of an emergency, at such time or times as will least interfere with the efficient operation and shall be approved by the appointing authority or an authorized person prior to the date the leave begins.** Employees absent without official leave may be subject to deductions from annual leave or salary, suspension without pay, or dismissal. Saturdays, Sundays and holidays occurring within a period of annual leave shall not be charged as annual leave. The minimum charge for annual leave shall be one-fourth day.

Any employee who is separated without fault or delinquency on his part shall be paid for any unused portion of his annual leave and this amount shall not exceed one months pay." (Emphasis supplied).

The above regulation apparently authorizes leave to be taken by a state employee in one of two ways. That is to say, by taking vacation leave during employment or by receiving his unused annual leave upon separation without fault. By the terms of the regulation quoted above, it is the opinion of this office that although an employee may receive a cash payment for any unused portion of his annual leave he will, nevertheless, continue to be employed but on leave from the State of New Mexico until the period for which he is paid has expired.

Keeping the above basic premises in mind, we turn to the specific question asked. In answer to Question 1 (a) as indicated above, an employee can receive vacation with pay or his annual leave by either taking his vacation with pay without terminating or upon termination without fault on his part. It would, therefore follow that an employee

who does not take time off from work or who is not terminating cannot receive annual leave or vacation pay while still working.

In answer to Question 1(b), we believe our answer and reasoning in Question 1(a) is also applicable - an employee who is reclassified and assigned new or different duties within the same department obviously is not entitled to annual leave or vacation time unless he either terminates his employment without fault or takes the vacation time due him.

In answer to Question 1(c), if an employee terminates but is rehired by the same department or agency and resumes work before the end of the period covered by annual leave or vacation, we feel that he should be entitled to leave only for the actual time between termination and the date the employee returned to work. The balance of leave could, however, be taken at a later date, subject, of course, to the 30-day restriction provided in the above quoted Personnel Regulation. As previously indicated, we have taken the position that annual leave received by a state employee at the time of termination continues his employment on leave status until he has used up the unused portion of his annual leave for which he has been paid. If the employee in this instance returns to his original employment, such action would merely terminate his leave status and return him to active work or service.

In answer to Question 1(d), we arrive at a somewhat different conclusion than in the other sections of Question 1. Under the facts presented in this question, an employee terminates without fault and is granted annual leave. Before the expiration of his annual leave, he is employed by a different state agency. As we will indicate in answer to Question 2 of this opinion, we believe that an employee may work for two state agencies if the services performed for the second agency does not result in a basic conflict of interests between the two offices. Previous A.G. Opinions Nos. 3906, 4031, 4293, 4651 and 4993 lend some support to the above proposition.

In view of the above, we believe it would be proper for a terminated employee who has been paid for annual leave from one agency to be employed by a **different** agency before the expiration of annual leave subject to the foregoing restrictions. The employee would have to perform services for the second agency which are not incidental to his original employment from which he had terminated and been paid for annual leave and such service should not result in a basic conflict of interests between the two offices. If these conditions are met, we see no reason why an employee cannot accept employment from a different state agency and in effect continue to draw annual leave from the agency from which he has terminated his employment. The above solution will prevent the necessity of charging the second agency employing the employee with paying the unused portion of annual leave acquired in the first state agency.

In answer to Question 2, it is the opinion of this office that an employee of the state who is employed by one department on a monthly basis could be entitled to remuneration from a second department or agency of the state if the services are performed at a time which are not regular working hours of the first department and in a location different

from that of the first department. The above conclusion is subject to only one restriction
- that there be no basic inconsistency or conflict of interests between the two offices.