

Opinion No. 59-27

March 11, 1959

BY: FRANK B. ZINN, Attorney General

TO: Colonel L. W. Varner Superintendent Fort Stanton Tuberculosis Hospital Fort Stanton, New Mexico

State agency may pay to next of kin of deceased employee wages due and pay due for accrued annual leave in aggregate amount of \$ 300.00 or less.

OPINION

{*38} This opinion is written in reply to your recent inquiries seeking answer to questions as follows:

To whom may your institution make payment of wages due a deceased employee?

May your institution make payment of sums due the employee for annual leave accrued but not taken?

The answer to your first question is that you may make payment of sums due for wages to the next of kin of the deceased employee without need for an administration of the employee's estate if the sum due is not in excess of \$ 300.00.

In my opinion you may also make payment of the sums due the employee for annual leave to that same next of kin, if the State Tuberculosis Hospitals' Board authorizes such payments. The combined sums due the deceased employee may be paid to the next of kin without administration if the amount is \$ 300.00 or less. If the total exceeds that amount you can only make payment to the properly qualified executor or administrator of the deceased employee's estate.

The statutes controlling payment without administration upon which this opinion is based are as follows: Section 31-13-1, N.M.S.A., 1953 Comp. (P.S.)

"The surviving husband or wife or next of kin, of any deceased person, may without procuring letters of administration, collect from the State of New Mexico or any political subdivision thereof, . . . any sum of money which the State of New Mexico, or any political subdivision thereof, . . . may have owed such deceased person at the time of his or her death, for wages or salary earned by such deceased person while in the employ of the State of New Mexico, or any political subdivision thereof, provided said sum of money shall not exceed \$ 300.00. . . ."

Section 31-13-2, N.M.S.A., 1953 Comp. (P.S.) provides:

"The State of New Mexico, or any political subdivision thereof . . . , upon receiving an affidavit stating that a person previously in the employ of the State of New Mexico, or any political subdivision thereof, . . . is dead, and that the affiant in such affidavit is the surviving husband, wife or next of kin, as the case may be, and that the whole amount that the State of New Mexico or any political subdivision thereof owed such deceased person at the time of his or her death, does not exceed the sum of \$ 300.00, may pay to such affiant any amount of such wages or salary earned by said deceased person if the same does not exceed \$ 300.00, and the receipt of such affiant shall be sufficient acquittance therefor."

As you will note from Section 31-13-2 the person making the affidavit provided for in such section is required to state that he or she is the husband, wife or next of kin or an agent of said survivor's husband, wife or next of kin, as the case may be.

The designation of an aunt as the beneficiary of his retirement contributions would have no bearing on the question of who the next of kin entitled to receive the payment due might be.

Under New Mexico laws of descent and distribution (29-1-8 through 29-1-21, N.M.S.A., 1953 Comp.) assuming the facts in the case you presented to be true; that is the decedent being a man divorced with his only known relatives being a child and an aunt, {*39} the true next of kin would be the child. The aunt could be considered next of kin only if it were true that there were no surviving relatives of the decedent who were either children, or heirs of children, parents, brothers or sisters or grandparents.

Your inquiry brings up the question of whether accrued leave or vacation time must be paid for by a state employer.

There is no specific statute authorizing payment for unused vacation time.

By practice many of the various departments do, in fact, pay for unused leave time when employment is terminated. The State Personnel Board has a regulation adopted in December of 1958 stating "any employee who is separated without fault or delinquency on his part shall be paid for any unused portion of his vacation allowance."

The legislature has indirectly indicated its recognition of the fact that employees might be entitled to vacations, by its enactment relating to penalties for paying for work or services not performed. This is indicated in Section 40-8-12, N.M.S.A., 1953 Comp. which begins:

"Except in the case of payments covering lawful vacation periods and absences from employment because of sickness, any person who receives payment, or any person who makes payment or causes payment to be made from public money where such payment purports to be for wages, salary, or other return for personal services and where such services have not in fact been rendered, shall be guilty of a felony"

In my opinion the general authority of the State Tuberculosis Hospitals' Board as set forth in Section 13-7-14, N.M.S.A., 1953 Comp. (P.S.) "(g) To appoint and remove officers, agents, employees and to fix their compensation; . . ." in the absence of restrictive legislation to the contrary would permit them to make payment for vacation time or not as they deemed proper.

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