

Opinion No. 66-142

December 22, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Joel M. Carson, Assistant Attorney General

TO: Mr. C. R. Sebastian, Director, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

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Is a district judge who retires entitled to termination pay in lieu of accrued vacation time in the same manner as appointed heads of departments of state government?

CONCLUSION

No.

OPINION

{*185} ANALYSIS

At the outset, in order to avoid confusion, let us dispel one misconception which is inherent in the question as it is phrased. The question assumes that district judges may accrue vacation time. We are convinced that district judges do not accrue vacation time.

A vacation with pay is in effect additional wages, which are deferred compensation for work performed by an employee. **Smith v. Kingsport Press, Inc.**, 233 F. Supp. 643 (1964), **In Re Wil-Low Cafeterias, Inc.**, 111 F.2d 429 (1940), **General Tire and Rubber Co. v. Local No. 512**, 191 F. Supp. 911 (1961). Vacations and vacation pay depend upon an agreement with the employing agency. To allow a vacation for periods prior to the agreement or without an agreement results in giving the person a pure gratuity. **Nollett v. Hoffman**, 297 N.W. 164 (1941).

Therefore, it is apparent that a paid vacation is merely the deferred payment of wages which the employee has earned or will earn. It may not be paid if it is a gratuity and an employee is not entitled to a vacation unless it is by agreement with the employing agency. **Nollett v. Hoffman**, supra, **Smith v. Kingsport Press**, supra. New Mexico Constitution, Article VI, Section 18 provides that the legislature shall provide by law for the compensation of the district judges of this state. Section 16-3-33.1, New Mexico Statutes Annotated, 1953 Compilation (1965 P.S.) provides for the compensation of district judges.

Judges of the district courts shall receive an annual salary of seventeen thousand five hundred dollars (\$ 17,500), payable monthly. **No additional salaries shall be paid district judges on account of services rendered the state.** (Emphasis supplied.)

The salary of a district judge is seventeen thousand five hundred dollars a year which is to be paid to the judge monthly. Section 16-3-33.1, supra, provides that this amount is to be the total salary which is to be paid to the judge. If a judge were allowed to accrue paid vacation time in addition to the salary which he is paid as a judge he would be put in the position of receiving a gratuity, contrary to the provisions of Section 16-3-33.1, supra, and New Mexico Constitution, Article IX, Section 14. Thus a district judge may not accrue vacation time in addition to the salary provided for in Section 16-3-33.1, supra.

It has been suggested to us that the {*186} Personnel Act and the regulations promulgated by the Personnel Board provide for the accumulation of vacation time for which a person in the service may be compensated at the time of his termination. Section 5-4-31, New Mexico Statutes Annotated, 1953 Compilation, provides that the Personnel Act does not cover elected officials. A district judge is an elected official. New Mexico Constitution, Article VI, Section 12.

This opinion does not have the effect of depriving the district judges of this state of any vacation. Here, we merely advise that a district judge may not accrue vacation time for which he may receive extra compensation upon the termination of his employment.