

No. 129

**PUBLIC WELFARE—CRIPPLED CHILDREN'S DIVISION—STATE EMPLOYEES, leave of absence—
CONTINUATION PAY**

Held: The Crippled Children's Division of the State Department of Public Welfare may not provide for payment of salaries of employees while on furlough or leave of absence as provided by Chapter 47, Laws of 1941, because no statutory authority exists therefor.

May 28, 1941.

Thomas L. Hawkins, M. D.
Medical Director
Crippled Children's Division
State Department of Public Welfare
Helena, Montana

Dear Dr. Hawkins:

You have presented the following question to this office:

"Would you be kind enough to give us an interpretation of the following from the U. S. Department of Labor, Children's Bureau, Instructions to Official State Agencies with Regard to Plans and Financial Reports for Services for Crippled Children Under the Social Security Act, as Amended, which is in part as follows:

"**Military Leave:** The Solicitor of the Department of Labor has advised the Chief of the Children's Bureau;

"(1) That funds granted to a State under the provisions of title V, part 2, of the Social Security Act, as amended, are available to reimburse the State for salaries paid to its employees under the provisions of the State law while such employees are engaged in the performance of military duties in the armed forces of the United States, subject, of course, to the matching requirements and other conditions of title V, part 2, of the Social Security Act.

"(2) That in the absence of a State statute, funds granted to a State under the provisions of title V, part 2, of the Social Security Act, as amended, may be used to reimburse the State for salaries paid, under valid State administrative regulations, to State employees

while engaged in the performance of military duties in the armed forces of the United States, provided such regulations are applicable to State employees generally and conform to standards established by the Federal Government for its civilian employees while engaged in the performance of military duties.

"The Solicitor has stated further that in the absence of State legislation providing for the continuation of civilian pay to employees called into active military service, no provision by administrative regulation should be recognized or accepted other than to provide for (1) Payment of accrued annual leave to members of the Naval Reserve ordered into active duty; (2) payment of accrued annual leave to other employees ordered into other kinds of active military service, if the combined military and civilian compensation of any such employee is less than \$2,000 per annum; (3) credit for accrued annual leave upon return to civilian positions; (4) the right to restoration to civilian positions formerly held or positions of like seniority, status, and pay.

"The Solicitor has pointed out also that although a State may use funds granted to it for the purpose of continuing the civilian compensation of its employees called into military service, its ability to do so will necessarily be limited by the amount of funds which may be granted to it by the Federal Government and that a State's program of services for crippled children may be seriously affected if substantial portions of the State's allotments of Federal funds are used for continued payments of civilian salaries during periods of military service."

"This Division is particularly interested as to how such an Agency is to interpret these instructions, as to what powers rest in the Agency and to what extent the laws of Montana change the instructions.

"In other words, should an employee of the Crippled Children's Division be called into active Service and request from this Division continuation of civilian salary, would the Agency be prohibited or compelled to grant such continuation of pay?"

Chapter 47, Laws of 1941, provides for leave of absence for state employees serving in the military forces of the United States, and for reemployment in the same position upon return to civil life. The Act specifically provides that, upon restoration to his position, he "shall be considered as having been on furlough or leave of absence during his period of training and service in land or naval forces," and "shall be entitled to participate in any insurance or other benefits offered by the State of Montana . . . pursuant to established rules or practices relating to employees on furlough or on leave of absence in effect at the time such person is ordered into such service . . ." The Act does not provide for continuation of pay. I find no other statute authorizing payment of salaries to state employees while on leave of absence or furlough.

Our statutes, therefore, not providing for continuation of pay, your division could not avail itself of the first paragraph of the Solicitor's advice.

The second paragraph of the advice provides that in the absence of a state statute funds granted to the State under Title V, Part 2 of the Social Security Act, may be used to reimburse the State for salaries paid under valid State administrative regulations, provided such regulations are applicable to state employees generally. The Solicitor in this paragraph refers to "valid State administrative regulations," which must be applicable to state employees generally. It would appear to me that this would require a regulation promulgated by an authoritative state officer or body providing for continuation of pay and be applicable to all state employees on leave of absence as defined in Chapter 47, Laws of 1941.

Chapter 5, Laws of 1937, places in the Governor the power and authority to approve the employment, tenure and compensation of all employees

of every civil executive officer, board, commission, bureau, department or authority of any kind appointed by him, and then provides:

“. . . that the total expenses of any such office, board, commission, bureau, department, or authority of any kind shall not exceed in the aggregate during any fiscal year, the amount appropriated by the Legislature for such fiscal year for such office, board, commission, bureau, department or authority of any kind.”

Section 274, Revised Codes of Montana, 1935, provides:

“The compensation paid to the several assistants, clerks and stenographers for all civil executive officers, boards, commissions or departments shall not exceed the maximum sum specified in the annual appropriation bill passed by the legislative assembly for the year specified, and the sum so specified in the annual appropriation bill shall be in full compensation for all services rendered by such assistants, clerks and stenographers.”

Assuming such a state administrative regulation might be promulgated, in the light of the statutes above quoted your division could not lawfully pay salaries to employees while absent in military service if such payments, together with payments of salaries to those employed in place of the absentees, would exceed the appropriation for this purpose for the fiscal year.

In the absence of a valid administrative regulation and of a statute providing for continuation pay, it is my opinion, under existing statutes, your division may not provide for payment of salaries of your employees while on leave of absence or furlough authorized under Chapter 47, Laws of 1941.

Sincerely yours,

JOHN W. BONNER
Attorney General