

Opinion No. 37**Vacation of Employees—County
Commissioners—Powers and
Limitation.**

Held: (1) State, county and city employees are entitled as a matter of right to vacation leave or separation pay for time earned prior to the effective date of Chapter 152, Session Laws of 1951.

(2) Employees of the state, county or city are not entitled to a vacation leave or separation pay as a matter of right after February 28, 1951, unless they shall have been in continuous service of the state, county or city for one year from the date of their employment.

(3) It is within the inherent power of a board of county commissioners to grant vacation leave or separation pay to employees who have not been in continuous employment of the county for one year.

August 27th, 1951.

Mr. Edward J. Ober, Jr.
County Attorney
Hill County
Havre, Montana

Dear Mr. Ober:

You have requested my opinion on whether certain part time employees of Hill County are entitled to cash compensation in lieu of vacation time upon termination of their service under conditions not reflecting discredit upon themselves.

In 1949 the Thirty First Legislative Assembly enacted Chapter 131, Session Laws of 1949. Section 1 of this Chapter provided as follows:

"Section 1. Each employee of the state, or any county or city thereof, is entitled to and shall be granted

annual vacation leave with full pay at the rate of one and one-quarter (1½) working days for each month of service, such service to be computed from the date of employment."

The last legislative assembly amended Chapter 131, *supra*, by enacting Chapter 152, Session Laws of 1951. Section 1 now provides as follows:

"Section 1. Each employee of the state or any county or city thereof, who shall have been in continuous employment and service of the state, county or city thereof, for a period of one (1) year from the date of employment is entitled to and shall be granted annual vacation leave with full pay at the rate of one and one-quarter (1½) working days for each month of service."

Section 3 of the 1949 Act provided as follows:

"An employee, who is separated from the service of the state, or any county or city thereof, for reason not reflecting discredit on himself, or any employee transferred to or employed in another division or department of the state, or any county or city thereof, shall be entitled to upon the date of such separation from transfer to or acceptance or new employment within the state, county, or city service, to cash compensation for unused vacation leave."

It is perfectly clear that the employees would be entitled to cash compensation pay in lieu of vacation upon their separation from the county's employ before the 1951 amendment. Chapter 152, Session Laws of 1951, took effect upon its passage and approval on February 28, 1951. Therefore, any unused vacation leave, or pay in lieu of leave, that had been earned prior to February 28, 1951 is still due to the employee. There is nothing in the new act evidencing a legislative intent that the law was to act retroactively. Laws are presumed to be prospective and not retroactive in operation. Section 12-201, R. C. M., 1947; State ex rel. Mills v. Dixon, et al., (*Educational Bonds Case*) 68 Mont. 527, 219 Pac. 637. Therefore, the part time employees are clearly entitled to "separation pay" for the amount of unused leave accrued on February 28, 1951.

The next question is whether these employees are entitled to "separation pay" for February 28, 1951 to the date of their separation in view of the 1951 amendment. Chapter 152, Session Laws of 1951, did not undertake to amend Section 3 of Chapter 131, Session Laws of 1949. However, Section 3 refers to "cash compensation for unused vacation leave" and refers to the vacation leave provided for in Section 1. Hence, it is my opinion that under the new amendment employees separated from state, county or city service and who have not been in continuous employment for one year are not entitled as a matter of right to vacation leave because there is no leave that has been "unused."

However, it should be noted that for many years prior to the enactment of the vacation law in 1949 it had been the custom for the various departments of the state, county and city to grant vacations to employees. How much time was allowed was determined by the policy formulated by the department head under whom the employees worked. In the counties the vacation policy was formulated by various county officers with the approval of the boards of county commissioners. See Opinion No. 225, Vol. 20, Opinion No. 398, Vol. 15 and Opinion No. 220, Vol. 19, Official Opinions of the Attorney General. Prior to the 1949 act the employee had no absolute right to any vacation, and the only effect of Chapter 131, Session Laws of 1949 was to establish a minimum vacation leave to which the employee would be entitled as a matter of right. Hence, it is my opinion that it is within the inherent power vested in boards of county commissioners by virtue of their supervisory position to grant vacation time or separation pay in lieu of vacation time even though the county employee may not be in continuous service for one year, but the employee is not entitled to such vacation leave or separation pay as a matter of right unless he shall have been in continuous service of the county for one year.

Therefore, it is my opinion that:

(1) State, county and city employees are entitled as a matter of right to vacation leave or separation pay for time earned prior to the effective date of Chapter 152, Session Laws of 1951.

(2) Employees of the state, county or city are not entitled to a vacation leave or separation pay as a matter of right after February 28, 1951, unless they shall have been in continuous service of the state, county or city for one year from the date of their employment.

(3) It is within the inherent power of a board of county commissioners to grant vacation leave or separation pay to employees who have not been in continuous employment of the county for one year.

Very truly yours,
ARNOLD H. OLSEN
Attorney General