

Opinion No. 45**Vacation Pay—Public Employees Retirement System—Section 59-1003,
Revised Codes of Montana, 1947**

Held: Where a member of the Public Employees Retirement System takes cash for unused vacation leave upon retirement from public service his retirement pay shall begin upon the day following his last day of service.

January 27, 1958

Mr. John H. Risken, Attorney
Oil and Gas Conservation Commission
Helena, Montana

Dear Mr. Risken:

You ask whether the retirement pay of a state employee should begin upon the day following the last day of his employment with the state if he is to be paid at the time of separation for vacation he has accumulated. Stated otherwise, should his vacation pay be considered to cover a period beyond his last day of work, at the expiration of which period his retirement pay will begin.

As you state the facts, the employee retired August 31, 1957, and on that date had accumulated 30 days leave for which he was compensated at his monthly rate of pay. Because of this fact you state that the Public Employees Retirement System began his retirement October 15, 1957, on the theory that he was on vacation status until that date.

Vacation leave for state employees is provided for by Sections 59-1001 to 59-1007 of the Revised Codes of Montana, 1947. This chapter recognizes the right of employees to take paid vacations or to take cash for unused vacation leave upon separation from state service.

Section 59-1003, RCM, 1947, provides:

"Separation from service or transfer to other department-cash for unused vacation leave. 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 upon the date of such separation from, transfer to or acceptance of new employment within the state, county, or city service, to cash compensation for unused vacation leave."

It was held in Opinions of the Attorney General, Volume 24, Number 89, that this vacation pay is not gratuity but a right of the employee for services rendered. This same opinion held that this right survives the death of the employee and becomes an asset of his estate. A deceased person is not employed. It follows that an employee is not employed by the state beyond his last day of service if he takes cash for his vacation pay under Section 59-1003, RCM, 1947.

Payment for unused vacation leave upon separation is payment for services already rendered. Then unless some provision of the Public Employees Retirement System Act requires that retirement pay not begin until a period of time equal to the separation pay elapses, this cash payment can have no bearing on when the retirement pay does begin and the retirement pay will have to follow the last day of employment.

Section 68-1306, RCM, 1947, to which my attention has been directed, does not prevent payment immediately following the last day of work.

Section 68-1306, provides:

"Retired members not eligible for pay from state, counties or cities or public agencies. No person who has been retired for service disability and who receives a retirement allowance under the retirement system shall be paid for any service rendered by him to the state or to a contracting city after the date of his retirement."

That section has reference to duplicate payments where additional service is rendered after the date of his retirement. Under Section 59-1003, supra, he is compensated for services previously rendered. Thus, there is no conflict.

This holding does not prevent an employee from beginning his vacation and retiring the last day of his vacation. The vacation period then would be part of his tenure of employment with the state.

For the reasons given above I hold that where an employee takes cash for unused vacation leave upon separation from service due to retirement his retirement pay shall begin upon the day following his last day of service.

Very truly yours,
FORREST H. ANDERSON
Attorney General