

VOLUME NO.37

OPINION NO. 176

EMPLOYEES, PUBLIC - Severance and accumulated leave payments; LEAVES OF ABSENCE - Attribution of sick and vacation leave payments to earned compensation; SCHOOLS AND SCHOOL DISTRICTS - Severance and accumulated leave payments, contractual and noncontractual; TEACHERS' RETIREMENT SYSTEM - Earned compensation: attribution of severance and accumulated leave payments; TEACHERS - Severance and accumulated leave payments: attribution for purposes of retirement benefits; REVISED CODES OF MONTANA, 1947 - Sections 68-1503(11), 75-6201(11) & (12), 75-6208(3) & (5); 37 OP. ATT'Y GEN. NO. 113 (1978).

HELD: 1. Contractual severance payments and payments based on unused sick or vacation leave are earned compensation of a member of the Teachers' Retirement System for the year in which they are actually paid to the member, provided they are properly reported to the system.

2. Severance payments or retirement stipends which are not provided for by contract and are unrelated to length of service or accumulated sick or vacation leave are not included in a member's earned compensation in the Teachers' Retirement System.

11 December 1978

Owen L. Morris, Jr., Administrator  
Teachers' Retirement System  
1500 Sixth Avenue  
Helena, Montana 59601

Dear Mr. Morris:

You have requested my opinion on the following questions:

1. Are contractual severance payments or payments based on unused sick or vacation leave considered earned compensation of a member of the Teachers' Retirement System for the year in which they are actually paid to the member or for the year(s) in which they are technically earned or accumulated?
2. Are severance payments or retirement stipends in flat dollar amounts, which are noncontractual in nature and are unrelated to the length of service or accumulated sick or vacation leave, considered earned compensation in the Teachers' Retirement System attributable to the year in which they are paid?

In the Teachers' Retirement System, as established by Title 75, chapter 62, of the Revised Codes of Montana 1947, superannuation retirement allowances and related benefits are figured as a percentage of a member's average final compensation. See section 75-6208 (3) & (5), R.C.M. 1947. "Average final compensation" is defined in section 75-6201 (12), R.C.M. 1947, as "the average of the earned compensation of a member during the three consecutive years of full-time service which yield the highest average and on which contributions have been made as required by 75-6207 (1)(a)." (Emphasis added.) Typically, it is the last three years of service on which average final compensation is based, because a member's highest compensation is generally earned in those years.

The linchpin of the computation of benefits in the Teachers' Retirement System is the amount of earned compensation attributable to each year of a member's service. "Earned compensation" is defined in section 75-6201(11), R.C.M. 1947, as "the full compensation, pay, or salary actually paid to a member and reported to the retirement system, including irregular forms of remuneration, such as amounts paid for special duty or under a salary reduction agreement, and amounts paid in kind, such as maintenance." (Emphasis added.) The initial question posed here concerns the validity of the system's policy of attributing contractual severance payments and payments based on accumulated sick and vacation leave to the earned compensation of a member's final year of service. The normal effect of this policy is to increase the member's average final compensation and consequently his benefits upon retirement or termination.

A prior Attorney General Opinion, reported at 37 OP. ATT'Y GEN. NO. 113 (1978), has evidently caused some doubt as to the propriety of the system's method of attributing severance and leave payments. That opinion, however, did not bear directly on the issue presented here. It dealt instead with the isolated issue of the legality of severance pay provisions in teachers' contracts and collective bargaining agreements, and held that such provisions are legal because contractual severance payments constitute a form of deferred compensation for services rendered by the employees throughout the course of employment. Nothing in that opinion was intended to prescribe the proper attribution of severance payments or the computation of earned compensation in the context of the Teachers' Retirement System.

In a technical sense, severance pay and payments based on unused leave are earned or accumulated throughout a member's period of employment. The definition of "earned compensation" in section 75-6201(11), R.C.M. 1947, however, is based not on the time of earning or accrual, but on the time of actual payment of compensation, pay or salary to the system member. In this regard, the computation of a member's earned compensation for a given year is analogous to the computation of a cash-basis taxpayer's yearly income. The language of section 75-6201(11), R.C.M. 1947, then, clearly mandates attribution of contractual severance pay and payments based on accumulated leave to the earned compensation of the last year of employment because that is the time of actual payment to the member.

Furthermore, in the absence of contrary judicial or legislative interpretation, the interpretation of a statute by the agency responsible for its implementation is entitled to great respect. See Miller Insurance Agency v. Porter, 93 Mont. 567, 575, 20 P.2d 643, 646 (1933). As pointed out earlier, it is the system's policy to allocate severance and accumulated leave payments to the year of actual payment, so long as the compensation is properly reported to the system and the required contributions are made thereon. The Legislature, which is presumptively aware of the system's past practice, has not amended the statutory definition of "earned compensation" to require a proration or allocation of these payments to the period of actual accrual. In the Public Employees' Retirement System, on the other hand, the Legislature specifically supplemented the definition of "final compensation" in 1977 to restrict the allocation of lump-sum leave payments to the replacement of normal compensation on a month for month basis. Section 68-1503(11), R.C.M. 1947. The absence of analogous amendment to the definition of "earned compensation" in the Teachers' Retirement System indicates legislative acceptance of the system's policy of attributing severance pay and accumulated sick and vacation leave payments to the member's earned compensation for the year in which they are actually paid.

The second issue presented by your inquiry concerns the inclusion of noncontractual severance payments or retirement stipends in the earned compensation of a member of the Teachers' Retirement System. As stated above, Attorney General Opinion No. 113 addressed and sanctioned the legality of contractual provisions for severance pay. Under the reasoning of that opinion, retirement payments not provided for in agreements or contracts between the parties during the course of employment amount to gratuities rather than any type of compensation, pay or salary for services actually rendered. Therefore, noncontractual severance payments do not fall within the definition of "earned compensation," as provided in section 75-6201(11), R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

1. Contractual severance payments and payments based on unused sick or vacation leave are earned compensation of a member of the Teachers' Retirement System for the year in which they are actually paid to the member, provided they are properly reported to the system.

2. Severance payments or retirement stipends which are not provided for by contract and are unrelated to length of service or accumulated sick or vacation leave are not included in a member's earned compensation in the Teachers' Retirement System.

Very truly yours,

MIKE GREELY  
Attorney General