

RETIREMENT SYSTEMS - Teachers' unused vacation and sick leave included in earned compensation of disability retirees;

TEACHERS - Computation of earned compensation for disability retirees under retirement system;

ADMINISTRATIVE RULES OF MONTANA - Sections 2.21.133, 2.21.141, 2.21.221, 2.21.232;

MONTANA CODE ANNOTATED - Sections 1-2-101, 2-18-611, 2-18-617, 2-18-618, 19-4-101(8);

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 176 (1978).

HELD: When a teacher retires on a disability allowance prior to the completion of a full year and is statutorily entitled to earned compensation in the Teachers' Retirement System in an amount equal to the "compensation, pay or salary which he would have received had he completed the full year," the Teachers' Retirement Board must include in the calculation of his earned compensation the value of the sick leave and vacation leave the member would have earned had he completed the contract year.

21 April 1983

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Dear Ms. Lane:

You requested my opinion on the following question:

When a teacher retires on a disability allowance prior to the completion of a full year and is statutorily entitled to earned compensation in the Teachers' Retirement System in an amount equal to the "compensation, pay, or salary which he would have received had he completed the full year," must the Teachers' Retirement Board include in the calculation of his earned compensation the value of the sick leave and vacation leave the member would have earned if he had completed the contract year?

Your opinion request arises from a college teacher's retirement due to disability. The teacher's contract included, as compensation, sick leave and vacation leave. Upon the teacher's retirement the college submitted a statement of his earned compensation, including amounts of vacation and sick leave he would have accrued had he completed the contract year. The administrative vice president of the college stated in a letter to the Teachers' Retirement System (hereinafter "TRS") that the University System's policy was to include those amounts as compensation. The TRS, on the other hand, interprets the pertinent statutes to exclude those amounts because they are speculative; that is, it is impossible to determine how much of the vacation and sick leave the teacher would have used had he completed the year.

I understand that the contract in question here was entered into before 1981. Since that time, the Teachers' Retirement Act has been amended, and amendments are pending further in the present Legislature (House Bill 169), to restrict and to clarify the definition of "earned compensation." The focus of this opinion is limited to retirement benefits that are governed by the "average final compensation" and "earned

compensation" definitions applied to this pre-1981 contract. I express no opinion here on questions arising under these statutes as subsequently amended.

The retirement benefits received by the member are determined on the basis of "average final compensation," which is the average earned compensation of three successive highest income years. § 19-4-101(5), MCA. The definition of "earned compensation," which is the crux of this opinion, is set forth in section 19-4-101(8), MCA:

"Earned compensation" means 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. The employer shall fix the value of any compensation paid in kind. The earned compensation of a member who had less than 3 consecutive years of full-time service during the 5 years preceding his retirement is the compensation, pay, or salary which he would have earned had his part-time service been full-time service. The earned compensation of a member who is awarded a disability retirement allowance prior to the completion of a full year is the compensation, pay, or salary which he would have received had he completed the full year. [Emphasis added.]

The Legislature enacted this subsection in 1977, and in so doing, created a separate and distinct treatment for disability recipients. For other retirees, the "average final compensation" is based on compensation actually paid, including payments for unused vacation and sick leave that are reported to the system. See 37 Op. Att'y Gen. No. 176 (1978). However, members who retire under a disability allowance are permitted to assume, for computation of "average final compensation," that they completed the contract year. The reason for this is obvious: The amount of retirement benefits the member will receive is based on an average of the three consecutive highest income years of service--usually the last three years of service. A member under normal conditions terminates his employment at the end of his

final contract year. A person retiring due to a disability may not be able to complete the contract year. Thus, the Legislature gave the disability retirees the benefit of treating the final year as though it had been completed.

There is no dispute that the "earned compensation" used by regular retirees in computing "average final compensation" includes payments made for unused vacation and sick leave. The language in section 19-4-101(8), MCA, does not qualify the definition of "earned compensation" for disability retirees to be different from that of regular retirees. The Legislature could have limited the definition of "earned compensation" for disability retirees with such language as "base pay" or "excluding vacation and sick leave not actually earned." Instead, it used the same language as that used for regular retirees: "compensation, pay, or salary."

The rules of statutory construction require words used to be given the natural and popular meaning in which they are usually understood. Jones v. Judge, 176 Mont. 251, 577 P.2d 846 (1978). "Compensation" is a generic term that when used with reference to services has been defined as "salary, fees, pay, remuneration for official services performed in whatever form or manner or at whatsoever periods the same may be paid." The term usually includes payment or credit for vacation and sick leave. Anderson v. Pension and Retirement Board, 355 A.2d 283 (Conn. 1974); 15A C.J.S. Compensation § 104. Thus, the interpretation of "earned compensation" to include unused vacation and sick leave is in accord with the accepted definition. If the Legislature had intended to exclude unused vacation and sick leave from the disability retiree's "earned compensation," it would have said so. I cannot impute that legislative intent by statutory construction. § 1-2-101, MCA.

TRS contends that the determination of vacation and sick leave the disability retiree would have earned had he completed the year was not intended by the Legislature to be included in "earned compensation" because it is speculative. Vacation and sick leave are benefits to which state employees are entitled by statute. §§ 2-18-611, 2-18-613, MCA. The employee is entitled "upon the date of such termination to cash compensation for unused vacation leave, assuming that the employee has worked the qualifying period...." § 2-18-617, MCA.

Similarly, "[a]n employee who terminates employment with the agency is entitled to a lump-sum payment equal to one-fourth of the pay attributed to the accumulated sick leave." § 2-18-618(5), MCA. It appears that unless the employee, in fact, uses the vacation and sick leave, he is entitled to the compensation for the unused benefits. See §§ 2-18-617, 2-18-618, MCA; §§ 2.21.133, 2.21.141, 2.21.221, 2.21.232, ARM. On this basis the disability retiree should be treated as though he did not use any of the vacation or sick leave benefits because he did not, in fact, use those benefits.

An agency's long-standing interpretation of a statute which it has the responsibility to administer is entitled to considerable weight. Montana Power Co. v. Cremer, 182 Mont. 277, 596 P.2d 483 (1979). However, this is a case of first impression: The agency does not have years of practical application of its interpretation of the statutes. Therefore, the aforementioned rule applies with little force. See Blackfeet Tribe of Indians v. Montana, 507 F. Supp. 446, 451 (D. Mont. 1981). Furthermore, legislation involving pensions and retirement benefits must be liberally construed in favor of the recipients. Automobile Drivers and Demonstrators Union Local No. 822 v. Department of Retirement Systems, 598 P.2d 379 (Wash. 1979); Goins v. Board of Pension Commissioners, 158 Cal. Rptr. 470 (1979). Construing the statutes liberally in favor of the recipients, I conclude that under section 19-4-101(8), MCA, a disability retiree is entitled to the benefit of the unused vacation and sick leave he would have earned had he completed the contract year.

THEREFORE, IT IS MY OPINION:

When a teacher retires on a disability allowance prior to the completion of a full year and is statutorily entitled to earned compensation in the Teachers' Retirement System in an amount equal to the "compensation, pay or salary which he would have received had he completed the full year," the Teachers' Retirement Board must include in the calculation of his earned compensation the value of the sick leave and vacation leave the member would have earned had he completed the contract year.

Very truly yours,

MIKE GREELY
Attorney General