ATTORNEY GENERAL OPINION
No. 83-4

July 29, 1983

OPINION
OF
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Attorney General

To: Denise D. Fort, Secretary
Department of Finance &
Administration
431 State Capitol
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FACTS

Prior to January 1, 1982, 42 USC §409(b) excluded from "wages" for FICA purposes

> "the amount of any payment... made to, or on behalf of, an employee... under a plan or system established by an employer which makes provision for his employees... on account of... sickness...."

Social Security Ruling SSR 72-56 interpreted 42 USC §409(b) to mean that a State must have specific legal authority to make payments on account of sickness to its employees. This authority to make payments on account of sickness was distinguished from authority to continue pay while an employee was absent from work due to illness. According to the Social Security Administration, this distinction was necessary because of state constitutional and statutory provisions that prohibit the state from making donation to state employees. These provisions require states to characterize sick leave as compensation rather than simply a benefit given to the employee by the employer.

A later Social Security Ruling, SSR 79-31, still required that a State have authority to make payment on account of sickness rather than merely authority to continue pay while absent from work, but did not require specific authorization by law. If no state statute or constitutional provision prohibited payment on account of sickness and the state established a sick leave plan, sick leave could be excluded from wages for FICA purposes.

Relying upon Attorney General Opinion No. 7-21, the State has included payment for days on sick leave in wages when calculating FICA taxes.

QUESTION:

Were amounts paid to state employees for sick leave under the state's established sick leave policy or system "wages" for FICA tax purposes, as defined by 42 USC §409(b) prior to its 1981 amendments? In other words, does the State of New Mexico have legal authority to make payments to state employees "on account of sickness"?

CONCLUSION:

See analysis.

ANALYSIS:

Attorney General Opinion No. 71-21 concluded that compensation to state employees on sick leave was a continuation of salary payments rather than a payment on account of sickness, and thus, reportable as wages for Social Security purposes. That opinion reasoned that N.M. Const. Art. IX, Sec. 14. prohibited the State from making donations to its employees and, therefore, paid sick leave must be considered compensation for services rendered.

It is the opinion of this office that N.M. Const. Art. IX, Sec. 14 does not prohibit the State from making payments to state employees on account of sickness. That provision states:

> Neither the state, nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly ... make any donation to or in aid of any person...; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons....

Thus, while generally prohibiting payments to employees other than for wages earned, the Constitution contains an exception to this prohibition for the care and maintenance of sick and indigent persons.

We believe that amounts paid to state employees for sick leave fall within this exception.

The exception for the care and maintenance of sick and indigent persons has been defined in several Attorney General Opinions. In Attorney General Opinion No. 58-135, it was concluded that the recipient of a donation under this clause of Art. IX, Sec. 14, need not be both sick and indigent. A donation for the care and maintenance of either the sick or the indigent is not prohibited.

Attorney General Opinion 69-103 decided that road work by a county for a charitable institution which provided care to sick persons was allowed as "provision for the care and maintenance of sick and indigent persons". Therefore, a rather liberal interpretation has been given to the "sick and indigent person" exception to the anti-donation constitutional provision.

"Maintenance", whether in connection with alimony, tax, or guardianship statutes, has been held to mean services that are necessary to promote physical, moral or mental well-being. See e.g., Day v. Brooks, 224 N.E. 2d 557 (Ohio 1967). "Care" is substantially the same as maintenance. Kelly v. Jefferis, 50 A. 215 (Del. 1901). Clearly, continuing an employee's pay while he or a member of his immediate family is ill is providing maintenance to the sick person, since the employee's salary is generally used for the care and maintenance of the employee and his family. Sick leave is also necessary for treatment or recuperation of the sick employee or family member.

State Personnel Board Rule 13-2 sets forth the State's sick leave plan for those employees covered by the Personnel Act. Sick leave is available only for illness or medical treatment of an employee or a member of his immediate family and to attend the funeral of an employee's immediate family. Sick leave benefits as provided by this plan could then be considered within the "sick and indigent persons" exception to Art. IX, Sec. 14.

This conclusion does not mean that sick leave is not also bargained for compensation for services rendered, which would also exempt sick leave from the operation of Art. IX, Sec. 14. Other Attorney General opinions have discussed sick leave for state employees and its relationship to Art. IX, Sec. 14. In Attorney General Opinion 77-8, for example, it was unnecessary to reach the question of whether sick leave is "care and maintenance of sick and indigent persons" because it was decided that sick leave was compensation for services rendered and thus, was not prohibited by the constitution.

Attorney General Opinion 72-33 specifically states that unearned sick leave cannot be given to public school employees because it would constitute a donation in violation of Art. IX, Sec. 14. It does not discuss the "sick and indigent persons" exception. Its conclusion, however, is further buttressed by Section 30-23-2 NMSA 1978 which prohibits paying or receiving public money for services not rendered. The opinion concludes this

statute prohibits a salary advance for sick leave unearned.

In conclusion, sick leave may be considered payment on account of sickness and was not wages for FICA purposes prior to the 1981 amendment to the Social Security Act. Attorney General Opinion 71-21, discussed above and that part of Attorney General Opinion 72-33 which holds that payment of unearned sick leave violates Art. IX, Sec. 14, are overruled.