Attorney General of New Mexico

HAL STRATTON
Attorney General

HENRY M. BOHNHOFF
STEPHEN WESTHEIMER
Deputy Attorneys General

P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6000

June 27, 1988

OPINION
OF
HAL STRATTON
Attorney General

Opinion No. 88-40

BY: Scott D. Spencer
Assistant Attorney General

TO: Honorable Alfred W. Nelson
New Mexico State Senator
625 Sixth Street
Las Vegas, NM 87701

QUESTION:

May the provisions of a municipal ordinance that allows retiring employees to convert to vacation leave any sick leave that has been accumulated prior to retirement be applied to employees who have retired prior to the enactment of the ordinance?

CONCLUSION:

No.

ANALYSIS:

Article IV, section 27 of the New Mexico Constitution provides: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution." The New Mexico Supreme Court has not expressly stated that this section applies to municipal employees. However, in State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954), the court applied the section to an act that covered municipal employees as well as state and county employees. The court noted that the plaintiffs were "employees of the state or its political subdivisions," id. at 545, 273 P.2d at 745, and did

not distinguish between employing entities. The court also has applied the limitations of Article IV, section 27 to changes in county officials' compensation. See State ex rel. Gilbert v. Board of Comm'rs of Sierra County, 29 N.M. 209, 222 P. 654 (1924). We further note that this office has applied article IV, section 27 to changes in municipal officers' compensation. See Att'y Gen. Op. 81-17 (1981) (city council members may not increase their compensation during the term for which they were elected); Att'y Gen. Op. 79-27 (1979) (municipal judge's salary may not be increased during the term for which he was elected); Att'y Gen. Op. 69-2 (1969) (where no salary was provided for municipal governing body when members took office, they may provide a salary for themselves; overruling Att'y Gen. Op. 62-85 (1962)); Att'y Gen. Op. 62-85 (1962) (where a salary is provided for municipal governing body for the first time, members may not receive the salary during their term of office). Finally, in statutory interpretation "words will be given their plain and ordinary meaning unless a different intent is clearly indicated." Foster v. Board of Dentistry, 103 N.M. 776, 777, 714 P.2d 580, 581 (1986). Webster's Ninth New Collegiate Dictionary, at 952 (1983) defines "public servant" as "a government official or employee." A municipality is a unit of government. We therefore conclude that article IV, section 27 applies to municipal employees.

The New Mexico Supreme Court authoritatively construed article IV, section 27 in State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942). There, the court considered whether a statute establishing a pension plan could be applied lawfully to an employee who retired before the statute's enactment. The court observed that a pension plan may be justified because it "is an inducement to the able to enter the service of the State, and for an equally good reason it is an inducement to those who have grown old in the service to step down and make way for the more efficient." Id. at 368, 129 P.2d at 333. Where an individual had retired before the statute's enactment, however, the individual "could not have come into the service, stayed in it, nor left it because of" the statute. Id. After adopting "the theory that there must be some relation between the service and the reward through pension, and some reasonable theory of public benefit accruing by virtue thereof, id., the court held that the retiree could not receive the benefits of the statute. Id. at 369, 129 P.2d at 333.

Several Attorneys General have applied Trujillo's principles and uniformly concluded that retroactive compensation increases violate article IV, section 27. See, e.g., Att'y Gen. Op. 81-16 (1981) (corrections department may not pay, on behalf of correctional officers, officers' additional member contributions to PERA required of "state police" members for the period of time that officers were covered as "regular members"); Att'y Gen. Op. 71-7

(1971) (department of health and social services may not give retroactive pay increases to employees); Att'y Gen. Op. 62-28 (1962) (Miner's Hospital employees legally may not receive monthly salary increases, effective August 1, 1961, at any date subsequent to August 31, 1961; if retroactive salary increases have been made, payments should be recovered); Att'y Gen. Op. 57-17 (1957) (legislature may not grant retroactive pay increases to state employees for services already rendered).

We conclude from these authorities that article IV, section 27 does not permit retired municipal employees to take advantage of an ordinance that allows employees to convert sick leave to vacation leave.[1]

HAL STRATTON
Attorney General

SCOTT D. SPENCER
Assistant Attorney General

---

1 The question presented does not indicate the purpose of a municipal ordinance that allows conversion of sick leave to vacation leave. We emphasize, however, that while a municipality may allow employees to cash out accumulated sick leave when they retire, it may not allow, directly or indirectly, employees to use accumulated sick leave to increase their pensions under the Public Employees Retirement Act, Sections 10-11-1 to 10-11-140 NMSA 1978. Subsection 10-11-2P expressly excludes sick leave from the definition of salary, and thus from inclusion in the computation of final average salary and retirement benefits. See, e.g., Section 10-11-47.