

## **N.D.A.G. Letter to Sulewski (March 31, 1992)**

March 31, 1992

Ms. Wendy Sulewski  
Stutsman County State's Attorney  
511 Second Avenue SE  
Jamestown, ND 58401

Dear Ms. Sulewski:

Thank you for your February 3, 1992, letter inquiring whether counties may pay year-end bonuses to county employees who are merit system employees and to those county employees who are not merit system employees.

Merit system employees are those required by state or federal statute, rule, or practice to be employed under a merit system of personnel administration. County social service board employees are involved in the administration of numerous programs involving the expenditure of federally derived funds, which require employees to be under a merit system. Those programs include Food Stamps (7 U.S.C. § 2020(e)(6)(B) (1988)), Aid to Families with Dependent Children (42 U.S.C. § 602(a)(5) (1988)), Medicaid (42 U.S.C. § 1396a(a)(4)(A) (1988) Adoption Assistance and Foster Care (42 U.S.C. § 671(a)(5) (1988)) and Child Welfare Services (45 C.F.R. § 1392.49(c) (1990)). For example, Medicaid rules require that a state have a system of personnel administration based on merit principles and that the state or local agency certify that it is in use. The system is required to be in conformance with 5 C.F.R. pt. 900, subpart f, Administration of the Standards For Merit Systems of Personnel Administration. 42 C.F.R. § 432.10. Those standards for a merit system of personnel administration state:

The quality of public service can be improved by the development of systems of personnel administration consistent with such merit principles as--

(a) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(b) Providing equitable and adequate compensation.

(c) Training employees, as needed, to assure high quality performance.

(d) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens. This "fair

treatment" principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.

(f) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.

5 C.F.R. §900.603.

Where county employees are required to be employed under a merit system of personnel administration, it is the state merit system adopted under N.D.C.C. chs. 54-42 and 54-44.3 that applies. N.D.C.C. § 54-44.3-17. This system is monitored by the Central Personnel Division and is based on Central Personnel Division personnel policies, rules, and compensation and classification plans. N.D.C.C. § 54-44.3-12, N.D. Admin. Code ch. 4-07-02. See 1981 N.D. Op. Att'y Gen. 413.

A basic requirement of the merit system of personnel administration monitored by the Central Personnel Division is that all merit system employees be paid within the salary range for their classified position. N.D. Admin. Code § 4-07-02-05. An annual bonus, paid at year end during one month is not a one month increase, but is recognition for service during the year. A bonus has been described as "a premium or extra or irregular remuneration in consideration of offices performed or to encourage their performance." BLACK'S LAW DICTIONARY (4th ed. rev. 1968).

Paying year end bonuses to county employees covered by a merit system is not prohibited. However, such a bonus, must be paid equitably just as any other feature of a merit system of personnel administration. This includes calculating whether the bonus, spread throughout the year, takes the monthly salary over the maximum relevant salary range. Therefore, before bonuses can be distributed to merit system employees, a policy or rule of procedure for determining eligibility and amount, must be developed either at the state or county level. If developed at both levels, the State Central Personnel Division rule would prevail in the event of a conflict. Letter from Attorney General Nicholas J. Spaeth to Carol S. Nelson, Barnes County State's Attorney, July 7, 1989.

It is therefore my opinion that county merit system employees may be paid year end bonuses if there is a policy or rule setting out the plan for the awarding of bonuses and if the bonuses, spread over the year, do not take the employee's salary over the maximum of the salary range.

For county employees not employed under a merit system of personnel administration, it is my opinion that year end bonuses are not prohibited if they are budgeted under N.D.C.C. ch. 11-23 and appropriations exist for their payment. However, any county embarking on paying such bonuses should have a personnel policy setting out the criteria for eligibility and awarding of the bonuses to avoid allegations of pay inequity or favoritism.

I hope this opinion adequately responds to your inquiry.

Sincerely,

Nicholas J. Spaeth

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