

LETTER OPINION
94-L-170

July 1, 1994

Mr. Marshall W. Moore
Director
Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Dear Mr. Moore:

Thank you for your June 3, 1994, letter concerning the use of a type of administrative leave for state employees. You cite circumstances of extreme weather conditions involving public safety and the requirement for employees to be on the job when they would otherwise be using annual leave, and circumstances involving disciplinary proceedings after a pretermination notice has been given to an employee.

From your description, it appears that "administrative leave" may exist within the personnel policies of the North Dakota Department of Transportation (NDDOT). State statutes and administrative rules of the Central Personnel Division and the State Personnel Board do not define or describe a type of employee leave known as "administrative leave."

On the subject of the use of a state employee's annual leave, North Dakota Century Code (N.D.C.C.) ? 54-06-14 provides in part:

Annual leave and sick leave must be provided for all persons in the permanent employment of this state who are not employed under a written contract of hire setting forth the terms and conditions of their employment, within the limitations, terms, and provisions of this section. . . . Annual leave must be compensated for on the basis of full pay for the number of working days' leave credited to the employee. . . . Any state agency, unit, or entity which employs persons subject to this section shall formulate and adopt rules governing the granting of annual leave and sick leave which will effectuate the purpose of this section and best suit the factors of employment of that employing unit.

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(Emphasis supplied.)

Consistent with the mandatory nature of the provision of annual and sick leave provided for by N.D.C.C. ? 54-06-14, it has been held that vacation with pay is not a gratuity, but is compensation for services rendered. Ramey v. State, 296 N.W. 323, 325 (Mich. 1941).

For the purposes of enhancing greater uniformity in matters relating to probationary periods, hours of work, leaves of absence, separations, transfers, disciplinary actions, grievance procedures, and performance management, the director of the Central Personnel Division can adopt administrative rules which are binding on the agencies affected for employees in the classified service. N.D.C.C. ? 54-44.3-12. Such rules have been adopted and appear in North Dakota Administrative Code (N.D. Admin. Code) art. 4-07. Various types of employee leave are provided for and discussed in N.D. Admin. Code chs. 4-07-12 through 4-07-17. Although six chapters of N.D. Admin. Code art. 4-07 deal with types of employee leave, the article does not expressly provide that the types of leave defined and explained are the only types of leave that may be provided to state employees. For example, I am aware that some agencies provide short-term educational leave for the benefit of employees and the agency and when educational requirements are imposed by professional licensing organizations. Furthermore, agencies may provide military leave under N.D.C.C. ? 37-01-25 for the National Guard and Armed Forces Reserve of the United States. Also, state policy encourages employers to establish procedures for employee time off to vote if their work schedule conflicts with voting during the time when the polls are open. N.D.C.C. ? 16.1-01-02.1. It is conceivable that other types of employee leave not provided for by administrative rules may exist in some agencies.

The administrative rules of the Central Personnel

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Division provide that annual leave requests must be approved prior to the employee taking leave, and that the leave request may be denied if the employee's absence would unduly disrupt the operations or services of the agency. N.D. Admin. Code ? 4-07-12-07. Also, the rules direct agencies to establish cut-off dates for the usage of annual leave and limit the amount of annual leave employees may carry over from year to year to 240 hours. N.D. Admin. Code ? 4-07-12-08. These sections, however, do not authorize complete denial of the use of or payment for annual leave provided for by N.D.C.C. ? 54-06-14 when it is employer demands that result in the inability of the employee to use annual leave before the relevant cut-off date and therefore exceed the carryover limit.

The Legislature's grant of authority in N.D.C.C. ?54-06-14 to any state agency to "formulate and adopt rules governing the granting of annual leave and sick leave which will effectuate the purpose of this section and best suit the factors of employment of [the] employing unit" is separate from the rulemaking authority granted the Central Personnel Division in N.D.C.C. ? 54-44.3-12. The rules referred to in this section 54-06-14 would be rules relating to the internal management of the agency and therefore excluded from the definition of rule and the need for formal adoption under N.D.C.C. ? 28-32-01(11)(a).

It is apparent that agencies need to be able to deal with emergency situations, especially those involving public safety, and to control and regulate the hours worked by employees in order to satisfactorily conduct the obligations of the agency. The use of administrative leave was recognized by the North Dakota Supreme Court in the case of Piccagli v. North Dakota State Health Department, 319 N.W.2d 484, 487 (N.D. 1982). The supreme court recited a memorandum agreement between the State Health Department and a departing employee by noting:

1) The Department of Health has agreed to place Giorgio Piccagli on administrative leave with pay for the period January 1, 1981, to February 28, 1981.

"Administrative leave" provides a vehicle for administrators of state government agencies to be able to respond to unusual or unexpected circumstances and

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effectively deal with them in order to carry out their government functions.

When the Legislature enacts a statute, those subject to it are entitled to presume that a just and reasonable result, as well as a result feasible of execution, is intended by the enactment of the statute. N.D.C.C. ? 1-02-38(3) and (4). Under the circumstances you present concerning employees not being able to use accrued annual leave to avoid its loss before the relevant cut-off date because of management directives, N.D.C.C. ? 54-06-14 must be read together with the rules adopted by the Central Personnel Division and their purposes under N.D.C.C. ? 54-44.3-12(1) and interpreted to achieve a just and reasonable result and a result feasible of execution.

It is therefore my opinion that if your actions as the director of the NDDOT resulted in the inability of certain of your employees to use their accrued annual leave prior to losing it because of the advent of the cut-off date and the employee is not responsible for his or her own failure to use the leave within the relevant accrual year, then you have the discretion to grant those employees time off with pay so that their statutory entitlement to annual leave under N.D.C.C. ? 54-06-14 is not denied. Whether this leave is called "administrative leave," "leave of absence," "time off with pay," or some other name, is irrelevant.

You also raise an issue concerning disciplinary proceedings and the anticipated termination of the employment of an employee. Under these circumstances, the property interest of public employees has been determined to require certain due process rights, including notice of the cause for termination and the right to respond to those causes and explain the employee's side. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985). The court in Loudermill noted that where the property interest in continued employment is being deprived, an opportunity for notice and a hearing appropriate to the nature of the case is required. Naturally, there are some circumstances where a manager of a government agency must protect government property, functions, and other employees during the time an employment termination proceeding is underway. Under these conditions, it may be necessary for the manager to exclude the employee from the work premises during the conduct of

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the notice and informal procedure for response to the charges causing termination. Until the employee is given the appropriate time to respond, according to the agency grievance procedures, the employee, if necessary, may be excluded from the work premises and paid until final action is taken by the agency. Under those circumstances, granting an employee administrative leave would be appropriate.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
cc: Brian McClure, Director, Central Personnel
Division
Robert W. Peterson, State Auditor