

**OPINION**  
**56-45**

February 1, 1956 (OPINION)

DEPARTMENT OF HEALTH

RE: Deceased Employee, Obligation to Pay Heirs for Unused Leave  
of Deceased

This is in reply to your request for an opinion on the question whether or not the North Dakota State Department of Health operating under the State Merit System is obligated and has the legal right to pay the heirs or estate of a deceased employee for accumulated and unused annual leave remaining to the credit of the employee's account at the time of his death.

The rules and regulations adopted under the provisions of Article XIV have been examined, particularly the items pertaining to annual leave and vacations, sick leave, leave of absence without pay, military leave. Annual leave for vacation is an achievement arising out of a program established through the course of years for the mutual benefits of the employee and the employer. Vacation with pay is a personal privilege or right which the employee may exercise. This privilege or right is not such that the employee may barter, trade, sell or assign it if he so desires. This personal privilege or right is one of which he alone can avail himself. The employee may use or exercise this right or privilege without forfeiting or jeopardizing his position, standing or rating but in the event of his death this right or privilege does not inure to his dependents or next of kin.

A careful search has been made to determine whether or not any court rulings have been handed down on this particular question. None were found directly in point. There are several court determinations saying that vacation with pay is a form of wage or remunerations depending on the contract or regulation and the employee is entitled to such vacation with pay. In all of these instances it was the individual employee who was seeking to recover unused accumulated vacation because he was unable, for some reason, to take his vacation. The closest expression by the courts on this topic was found in a dissenting opinion in which it said that it would be absurd to say that the estate could take a vacation with pay. This expression apparently is applicable on the subject matter at hand.

It is noted that in the request for the opinion Public Law 636, approved August 30, 1950, is cited for our convenience. This particular Act has no significance in determining the question at hand. The question at hand must be determined on the rules and regulations promulgated under the provisions of Article XIV.

Any right or claim to payment of wages or salary in lieu of vacation with pay must be found in the contractual relationship of employer and employee coupled with such rules and regulations in effect. Being that the rules and regulations do not provide for payment or wages in lieu of vacation with pay we are unable to find any

authority to pay to the heirs or estate of deceased wages in lieu of unused vacation with pay, especially so where the state policy has been not to pay for unused leave or vacation with pay.

In direct response to your question as to whether or not compensation for accumulated annual leave is a legal obligation which must be paid it is our opinion there is no legal obligation to pay unused accumulated annual leave.

In response to your second question, if there is no legal obligation whether or not it is permissive compensation which may be paid at the discretion of the state agency, it is our opinion the state agency may pay only legal obligations. It may expend money only as authorized. The regulations do not authorize such payment.

In response to question number three whether or not the fact that the employee's salary is paid in full or in part from Federal funds has any bearing on the question, It is our opinion the rules and regulations in effect in North Dakota coupled with state policy relating to such matter is controlling rather than rules the regulations in effect in some other jurisdiction.

If the subject employees in question here was deprived of the privilege of his vacation with pay because of the necessity of his services or if an emergency prevented such subject employee from taking his vacation with pay then there might be some justification for paying wages in lieu of unused vacation. In the absence of such exception noted here vacation with pay is a right and privilege due the employee personally and on his death any such right or privilege is terminated. In our opinion unused annual vacation with pay on employee's death does not survive to his heirs or estate under the present rules and regulations in effect.

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Attorney General