

## 46 Op. Att'y Gen. No. 25

EMPLOYEES, PUBLIC - Employers' authority to offer "cash out" benefit for unused accumulated vacation leave;  
SCHOOL DISTRICTS - Authority to offer employees "cash out" benefit for unused accumulated vacation leave;  
ADMINISTRATIVE RULES OF MONTANA - Title 2, chapter 21, subchapter 2; sections 2.21.232, 2.21.234;  
MONTANA CODE ANNOTATED - Title 39, chapter 31; title 2, chapter 18, part 6; sections 2-18-604, -617, 39-31-102;  
MONTANA LAWS OF 1993 - Chapter 115;  
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 2 (1995), 45 Op. Att'y Gen. No. 21 (1995).

HELD:

Montana law does not permit a public employer to offer a "cash out" benefit to employees whereby the unused accumulated vacation leave credits of a public employee who is not terminating employment are "bought back" by the employer.

October 17, 1996

Mr. Robert Slomski  
Sanders County Attorney  
P.O. Box 519  
Thompson Falls, MT 59873-0519

Dear Mr. Slomski:

You have requested my opinion on the following question:

Does Montana law allow a public employer to offer a "cash out" benefit to employees, whereby public employees who are not terminating their employment are entitled to cash compensation for accumulated but unused vacation leave each year?

You state that this question arises out of a dispute between the Thompson Falls School District and the Thompson Falls Classified Employees Association. That dispute is over a provision in the collective bargaining agreement (CBA) that allows nonteaching employees to "cash out" their accumulated annual leave credits annually.

Preliminary questions have been raised as to whether your question actually represents the factual situation in Thompson Falls that prompted your request. I must note here that the range of issues on which I am authorized to offer my opinion is limited. Your letter of inquiry correctly notes that an Opinion of the Attorney General may not construe the language of a collective bargaining agreement. 45 Op. Att'y Gen. No. 21 (1993). However, there is a limiting rule of law: "[W]hen a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 46 Op. Att'y Gen. No. 2 (1995). Having reviewed the matter and discussed this with you, I conclude that your question is appropriately framed. The issue you present is a legal one: whether under Montana law public employees can be paid for accumulated vacation leave without terminating employment and without scheduling actual vacation leave during scheduled working hours.

For purposes of this opinion, I assume that the employees in question work under a contract which requires their presence on the job during the school year--that is, during those times when students are present, but which does not necessarily schedule the employees to work at other times, i.e., during student vacation periods. The employees remain employed by the district during these periods when no work is scheduled, but since they are required to do no work during that period they are not paid. This opinion is thus limited to a factual situation in which the employees are granted by contract the right,

without terminating their employment, to cash out their unused vacation leave credits during periods when they otherwise were not scheduled to work. I express no opinion here as to whether the school district and the employees could agree to a different arrangement under which the employees' work period is extended beyond the end of the school term to allow the employees to schedule paid vacation time, nor do I express any opinion about whether the current collective bargaining agreement for these employees could actually be construed so to provide.

The accumulation of leave by public employees is addressed in Mont. Code Ann. § 2-18-617. My analysis begins with an examination of this statute to determine whether the ability to cash out accumulated vacation leave has been legislatively addressed:

(1)(a) Except as provided in subsection (1)(b), annual vacation leave may be accumulated to a total not to exceed two times the maximum number of days earned annually as of the end of the first pay period of the next calendar year. Excess vacation time is not forfeited if taken within 90 calendar days from the last day of the calendar year in which the excess was accrued.

(b) It is the responsibility of the head of an employing agency to provide reasonable opportunity for an employee to use rather than forfeit accumulated vacation leave. If an employee makes a reasonable written request to use excess vacation leave before the excess vacation leave must be forfeited under subsection (1)(a) and the employing agency denies the request, the excess vacation leave is not forfeited and the employing agency shall ensure that the employee may use the excess vacation leave before the end of the calendar year in which the leave would have been forfeited under subsection (1)(a).

(2) An employee who terminates employment for a reason not reflecting discredit on the employee is entitled upon the date of termination to cash compensation for unused vacation leave, assuming that the employee has worked the qualifying period set forth in 2-18-611.

(3) However, if an employee transfers between agencies of the same jurisdiction, cash compensation may not be paid for unused vacation leave. In a transfer, the receiving agency assumes the liability for the accrued vacation credits transferred with the employee.

Mont. Code Ann. § 2-18-617. Summarizing the statute, subsection (1)(a) sets the maximum amount of annual vacation leave that may be accumulated before forfeiture; subsection (1)(b) sets out the state's policy on the use of accumulated vacation leave when forfeiture is imminent; subsection (2) sets out the state's policy regarding the unused vacation leave of employees who terminate employment; and subsection (3) sets out the state's policy regarding the unused vacation leave of employees who transfer between agencies of the same jurisdiction.

The question is, then: Does section 2-18-617 establish the exclusive conditions under which a public employee may cash out his or her accumulated unused vacation leave or does it merely set standards for public employees' vacation leave in the four situations specified above? It is clear to me that in passing what is now section 2-18-617, the legislature did not see that statute alone as the final word on the subject of annual leave. Mont. Code Ann. § 2-18-604. As is apparent from the various amendments made to section 2-18-617, the legislature from time to time also has sought to address difficult situations and refine the language of the statute. See also Bitney v. School District No. 44, 167 Mont. 129, 136, 535 P.2d 1273, 1277 (1975). This is well illustrated by the most recent amendment to the statute, 1993 Montana Laws, chapter 115.

House Bill 289, which became chapter 115, added the language that is now Mont. Code Ann. § 2-18-617(1)(b). The implication of that subsection of the statute is clear: If excess annual leave is accumulated, it must be used according to the conditions established in the statute or it is forfeited. The use of the phrase "use rather than forfeit" in the first sentence of subsection (1)(b) signals a legislative intent that these two were the only options. This point is well illustrated by asking the following question: Assuming that public employees will cash out rather than forfeit accumulated vacation leave, if the legislature had intended to permit employees to cash out unused vacation leave on an annual basis, would it have established the elaborate conditions for the forfeiture of excess leave? This question must be answered in the negative, as permitting an annual cash-out would have the practical effect of rendering

the forfeiture provisions of the law superfluous, and the legislature does not engage in superfluous acts. Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981).

Also, subsection (2) of the statute gives certain employees who are terminating employment the right to cash compensation for unused vacation leave. The negative implication is that all other public employees are denied that right. State v. Henry, 271 Mont. 491, 498, 898 P.2d 1195, 1199 (1995).

This legislative understanding is also clearly illustrated by the legislative history of HB 289. The bill as introduced contained the following language:

If an employee makes a written request to use excess vacation leave before the excess vacation leave must be forfeited and the employing agency denies the employee the use of the excess vacation leave, the employee is entitled to cash compensation for the unused, excess vacation leave.

1993 Mont. Legis., HB 289, sec. 1 (Introduced Bill). Before the hearing on this bill, the sponsor had requested a Fiscal Note, and the Fiscal Note came back stating in part, "If all forfeited leave in FY92 were compensated, total cash compensation [for state government alone] would have been \$255,000." The unanticipated magnitude of this figure necessitated the immediate drafting of an amendment by the sponsor, and caused some comment at the hearings. Mins., House Committee on State Admin., Feb. 1, 1993, at 1-4 and Ex. 1; Mins., Senate Committee on State Admin., Mar. 3, 1993 at 4, 5. The sponsor's amendment struck the requirement of cash compensation and substituted the requirement of additional time for the employee to use the excess vacation leave, which is now the final sentence of Mont. Code Ann. § 2-18-617(1)(b). Thus, it is clear the legislature intended that public employees not have the option of cashing out their accumulated but unused vacation leave.

In addition, the Personnel Division of the Department of Administration is the agency that administers this provision of law for the state. Mont. Code Ann. § 2-18-102. It has long interpreted Mont. Code Ann. § 2-18-617 to specifically limit the circumstances under which a cash-out is permissible. Mont. Admin. R. 2.21.232, 2.21.234; Montana Operations Manual 3-0305. That agency's construction of the statute is entitled to great deference:

An administrative agency's interpretation of a statute under its domain is presumed to be controlling. In fact, the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong.

Christenot v. State, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995) (citations omitted). The Personnel Division's construction of the statute is consistent with what I have concluded was the legislature's intent.

On the other hand, Montana Code Annotated title 39, chapter 31 (the collective bargaining for public employees law) makes it clear that both teaching and nonteaching employees of a school district have the right to bargain collectively over the conditions of employment. Also, nonteaching employees of a school district are covered by Montana Code Annotated title 2, chapter 18, part 6, which deals with leave time for public employees. Teamsters Local No. 45 v. Cascade County School Dist. No. 1, 162 Mont. 277, 280-81, 511 P.2d 339, 341 (1973). However, I conclude in this instance that the state's general policy encouraging collective bargaining between public employees and their employers is not sufficient to overcome the clear indications of legislative intent discussed above. Mont. Code Ann. § 39-31-102.

Recognizing that it is beyond my authority to construe a provision of a collective bargaining agreement, I must emphasize that I have studied the language at issue in the Thompson Falls Collective Bargaining Agreement, and I make no pronouncement on its meaning or legality. I believe the legislature has limited the cashing out of vacation leave to specific situations, and I find no statutory authorization for the modification of this condition of public employment through collective bargaining.

THEREFORE, IT IS MY OPINION:

Montana law does not permit a public employer to offer a "cash out" benefit to employees whereby the unused accumulated vacation leave credits of a public employee who is not terminating employment are "bought back" by the employer.

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/rfs/brf