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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 22 1994
DEPT. OF JUSTICE

DATE: August 10, 1994

SUBJECT: Application of Article III, Section 19 of the Nebraska Constitution to employee sick leave banks which would allow state employees to voluntarily transfer unused compensatory or holiday time to other employees who had exhausted their own sick leave benefits.

REQUESTED BY: Senator Jerry Schmitt
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You state that you are developing legislation for the 1995 legislative session concerning state employee union contract negotiations. In that regard, you have requested our opinion as to whether the Nebraska Constitution allows state employee unions to bargain for sick leave banks during contract negotiations. Such a sick leave bank would be established for employees who incur medically verified nonservice-connected illness or injury. The bank would allow other union members to voluntarily transfer to the affected employee's sick leave account enough of their earned compensatory time or holiday time to maintain the affected employee in a pay status after the employee's own sick leave was fully utilized. You ask, "[d]oes Article III, Section 19 of the Nebraska Constitution specifically prohibit the State of Nebraska and state employee unions from including this issue in contract negotiations?"

Article III, Section 19 of the Nebraska Constitution provides, in pertinent part:

David K. Arterburn, L. Jay Bartel, J. Kirk Brown, David T. Bydalek, Lisa L. Cabral, Laurie Smith Camp, Delores N. Coe-Barbee, Dale A. Comer, James A. Elworth, Lynne R. Fritz, Royce N. Harper, Mary L. Hewitt, Lauren Lee Hill, Jay C. Hinsley, Amy Hollenbeck, William L. Howland, Marilyn B. Hutchinson, Kimberly A. Klein, Donald A. Kohtz, Joseph P. Loudon, Charles E. Lowe, Lisa D. Martin-Price, Lynn A. Melson, Fredrick F. Neid, Marie C. Pawol, Kenneth W. Payne, Paul N. Potadle, James H. Spears, Mark D. Starr, John R. Thompson, Barry Waid, Terri M. Weeks, Alfonza Whitaker, Melanie J. Whittamore-Mantzios, Linda L. Willard

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> The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, . . . nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature, be increased or diminished during his term of office . . .

We will focus our analysis on the initial portion of the constitutional language quoted above, since we assume that the union members who would participate in the sick bank program would be state employees rather than state officers with a set term of office.

The purpose of state constitutional provisions prohibiting extra compensation to public employees after services are rendered is to prevent payments in the nature of gratuities for past services. 67 C.J.S. ***Officers*** § 236. As stated by the Nebraska Supreme Court in ***Wilson v. Marsh***, 162 Neb. 237, 75 N.W.2d 723 (1956), a case which, in part, involved the application of Article III, Section 19 to judicial pensions:

> It could hardly be made clearer or more positive that retirement benefits are either earned compensation for services rendered after the grant of them and that they are therefore valid or that they are a gratuity and not a part of compensation and therefore invalid.

Id. at 253, 75 N.W.2d at 733.

Under ***Neb. Rev. Stat.*** § 81-117 (1987) and the applicable state personnel rules, certain state employees can earn compensatory time off in instances where those employees are required to work more than 40 hours in any one week. In a similar fashion, state employees can earn compensatory time off on those occasions when they are required to work on holidays. The legislation which you are considering would apparently allow union employees who earned this compensatory time or holiday time to voluntarily transfer those hours to another union employee whose sick leave was exhausted. This arrangement would not result in a gratuity to the employees who earned the time which was transferred. However, the employee on sick leave who received the transferred time would obviously receive a gratuity, i.e., compensation for hours for which he or she had not worked.

While the employees on sick leave who received transferred compensatory or holiday hours would receive a gratuity under your proposal, we believe that the propriety of that arrangement turns on who or what is granting that gratuity. In other words, if the state is granting the gratuity under your proposal, then th

arrangement clearly violates Article III, Section 19. On the other hand, if the gratuity is actually from the employees who earned the extra hours and chose to transfer them, then the arrangement would not involve a gratuity from the state in contravention of Article III, Section 19. The latter arrangement would simply create a mechanism for one state employee to make a contribution to another. The ***Wilson*** case sheds some light on this question.

In the ***Wilson*** case, the court considered whether a judicial pension program which required contributions from a judge's salary beginning during the judge's term effected a diminution in the judge's salary under Article III, Section 19. In the course of its opinion, the court stated:

> The State of Nebraska retains 4 percent of the monthly salary of each judge within the act and credits the amount retained to a fund of its designation without participation in any way of the public official. ***These deductions are the retention of public money. They continue to be public money and the fund is a public one. The amount withheld by the state from the salary of judges never was and never will become their money or property.*** The annual salary of each fixed by law then earned and required to be paid in equal monthly installments is decreased by the amount deducted during his term of office.

Id. at 246, 75 N.W.2d at 729 (emphasis added). This language from the ***Wilson*** case indicates that monies held by the state and deducted from the salary of a state officer or employee as a part of a required pension program remain public monies. In this way, mandatory pension withholding instituted during an officer's term of office can result in a diminution of that officer's salary in violation of Article III, Section 19, since the public officer whose salary is subject to the withholding for the pension never receives the funds which are withheld. Language to the same effect concerning the nature of funds mandatorily withheld from an employee's salary for pension purposes is found in ***Gossman v. State Employees Retirement System***, 177 Neb. 326, 129 N.W.2d 97 (1964).

The ***Wilson*** and ***Gossman*** cases make it clear that monies withheld from an employee's salary on a mandatory basis remain public monies for purposes of Article III, Section 19. However, it seems to us that the converse of this rule would apply to monies contributed voluntarily to a pension program or to withholding for other purposes. Those funds would not be monies of the state, but would be the monies of the individual officer or employee, under his or her control to be paid at his or her direction.

From your letter, we understand that transfers of compensatory time and holiday time into your proposed employee sick banks would be voluntary on the part of the state employee who had earned that time. As a result, we do not believe that the time and compensation at issue in the transfer would represent public monies on the basis of the cases cited above. Instead, the transfer of compensatory or holiday time would represent a transfer of monies belonging to the state employee who had earned the hours off. The gratuity received by the employee who had exhausted his or her sick leave would, therefore, be a gratuity received from the individual who made the transfer to the bank rather than a gratuity from the state. On that basis, we do not believe that your proposal would violate Article III, Section 19.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

05-20-14.op

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved:

Attorney General