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STATE OF NEBRASKA
OFFICIAL
APR 8 1992
DEPT. OF JUSTICE

DATE: April 7, 1992

SUBJECT: Balancing the sick leave and vacation leave of state employees under Neb.Rev.Stat. §§ 81-1323 and 81-1328 (Reissue 1987).

REQUESTED BY: Allen J. Beermann, Secretary of State

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

You have asked for our opinion regarding the interpretation of certain portions of Neb. Rev. Stat. §§ 81-1323 and 81-1328 (Reissue 1987). Specifically, you question whether, for purposes of implementing Sections 81-1323 and 81-1328, a state employee's sick time and vacation leave should be balanced "as of" either the start of the day or the close of the day on December 31st each year. In your view, employees retiring on December 31st stand to lose some accumulated sick time and vacation leave if the balancing is performed at the start of the day.

Section 81-1323 provides that the sick leave of state employees "...shall be balanced as of December 31 each year. Sick leave shall be cumulative for not more than one thousand four hundred forty hours." The pertinent portion of Section 81-1328 similarly provides that the "...vacation leave account of each employee shall be balanced as of December 31 each year." There are also limits upon the amount of accumulated vacation leave that state employees can carry over in one year.

Neb.Rev.Stat. § 81-1325 (Reissue 1987) allows state employees who retire to receive a one-time payment of one-fourth of their accumulated, unused sick leave. Retiring employees can also receive payment for their unused vacation time.

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Your opinion request grows out of the potential impact of Sections 81-1323 and 81-1328 upon state employees who retire on December 31. Specifically, a retiring employee who is carrying sick leave beyond the maximum number of hours established by Section 81-1323 could lose payment for a portion of those hours if he or she retires on December 31, and his or her sick leave account is balanced while the employee is still considered as employed by the State of Nebraska. On the other hand, if, as you have proposed, the sick leave account is balanced at the close of business on December 31, the employee would be considered retired and no longer a state employee. The employee would then receive payment for one-fourth of all of his or her accumulated sick leave. A similar analysis applies to accumulated vacation time.

We have found little case law which interprets the meaning of the phrase "as of" as it is used in Sections 81-1323 and 81-1328, and the legislative history of those sections offers no assistance in determining the answer to your question. However, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. State v. Rios, 237 Neb. 232, 465 N.W.2d 611 (1991). In that regard, the phrase "as of" generally can be defined as "at or on a specific time or date." Webster's Third New International Dictionary (1981). As a result, Sections 81-1323 and 81-1328 require sick leave and vacation accounts to be balanced "at or on" December 31 of each year.

There is also authority for the notion that the phrase "as of" requires notice to be taken of a particular fact "as it existed" on a given date. In City of Twin Falls v. Koehler, 63 Idaho 562, 123 P.2d 715 (1942), the Supreme Court of Idaho examined the federal statutory procedural requirements for taking a census. The court reasoned that Congress had a specific purpose in mind for using the words "as of the first day of April." Id. at 567, 123 P.2d at 717. According to the court, the intention of Congress was to require that the population count would be the same as it actually existed on the first day of April. Id. at 567, 123 P.2d at 717. "At the same time, Congress realized that the count could not be actually made and completed in one day; and, for that reason, deemed it necessary to specify the date `as of' which count should be made." Id. at 567, 123 P.2d at 717. We believe the same reasoning applies to the balancing process required by Sections 81-1323 and 81-1328. The employee sick leave and vacation accounts at issue should be balanced "as they existed" on December 31.

It is, therefore, our view that the language in Sections 81-1323 and 81-1328 requires that the sick leave and vacation accounts of state employees be balanced at or on December 31 of each year. While the actual balancing process may occur subsequent to December 31, the accounts are balanced as they actually existed on that

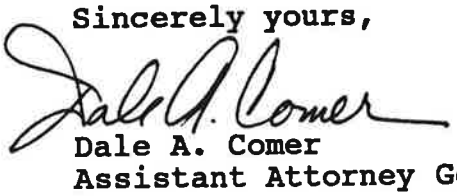
date. Individuals who were state employees on that date are subject to the balancing and forfeiture process.

It seems to us that individuals who retire at the end of day on December 31 are state employees at or on that date. Presumably, they are paid for the entire day, and they earn sick leave and vacation time for the entire day as well. Their official duties would continue up to the end of the day. As a result, they are state employees on that date, and we believe they are subject to the balancing and forfeiture provisions of Sections 81-1323 and 81-1328.

We understand that it can be argued that if the employee accounts in question are balanced at the close of business on December 31, individuals who retire at the end of the day on December 31 are not state employees when those accounts are balanced, and, therefore, their excess sick leave and vacation hours should not be forfeited. However, generally the law does not take cognizance of fractions of a day, and a day is to be considered as an indivisible unit or period of time. 86 C.J.S. Time § 16. Fractions of a day are ordinarily counted as a full day. State v. Jurgens, 187 Neb. 557, 192 N.W.2d 741 (1971). Since a day in normally considered to be an indivisible unit, it seems to us that the balancing of accounts contemplated by Sections 81-1323 and 81-1328 does not occur precisely at the beginning or precisely at the end of the day. Rather, the day is indivisible, and individuals employed at any time on that date are subject to the balancing and forfeiture provisions.

For the various reasons stated above, we therefore believe that state employees who retire on December 31 are subject to the provisions of Sections 81-1323 and 81-1328. In order to avoid possible forfeiture of sick leave and vacation time, they should retire prior to that date.

Sincerely yours,



Dale A. Comer
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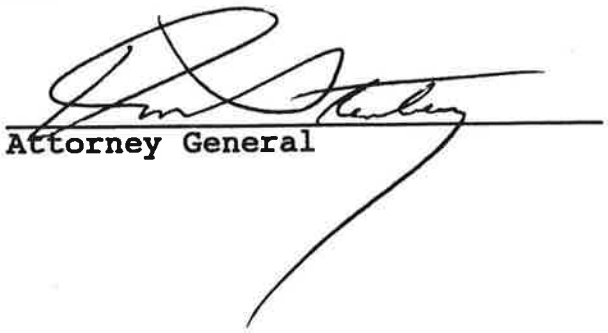
Approved by:



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