

LETTER OPINION
99-L-8

January 5, 1999

Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter questioning the authority of a state university to accept annual and sick leave balances for two recent hires which were accumulated while those individuals were employed by a private nonprofit corporation.¹ The nonprofit corporation in this instance is not a part of state government and its employees are not state employees.²

N.D.C.C. § 54-06-14 governs the administration of annual and sick leave for state employees not hired under a written contract and provides, in part, as follows:

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 for an employee entitled to it must be within

¹ The entity involved, the UND Aerospace Foundation, is a nonprofit corporation established for the purpose of providing support to UND's aerospace program. See Letter from Attorney General Heidi Heitkamp to the Honorable Rosemarie Myrdal (July 2, 1997).

² The case of the UND Aerospace Foundation is totally unlike that of another nonprofit corporation, Technology Transfer, Inc. (TTI), which was determined in 1992 N.D. Op. Att'y Gen. 25 to be an agency of the state and its employees to be state employees. TTI, although a nonprofit corporation, had its board of directors established by statute or appointed by the Governor, and the board members' qualifications were established by the Legislature. Id. The CEO of TTI also serves as an official of the Department of Economic Development and Finance and reports to the director of ED&F. TTI's authority and funding were established by the Legislature and it was subject to the open meetings and open records law. TTI was also required to provide annual reports to the Legislature and the Governor. Id. None of these factors are present with regard to the UND Aerospace Foundation.

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a range of a minimum of one working day per month of employment to a maximum of two working days per month of employment, based on tenure of employment, to be fixed by rules adopted by the employing unit. Sick leave for an employee entitled to it must be within a range of a minimum of one working day per month of employment to a maximum of one and one-half working days per month of employment, based on tenure of employment, to be fixed by rules adopted by the employing unit. Annual leave must be compensated for on the basis of full pay for the number of working days' leave credited to the employee. Sick leave must be compensated for on the basis of full pay for absence due to illness on working days during tenure of employment. . . . 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. Each employing unit shall file with the office of management and budget a copy of the rules adopted, including any amendments or additions to the rules.

The rules referred to in N.D.C.C. § 54-06-14 are not formal administrative rules under N.D.C.C. ch. 28-32 but rather are "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)." Letter from Attorney General Heidi Heitkamp to Marshall W. Moore (July 1, 1994). A member of my staff confirmed with counsel to the State Board of Higher Education that there were no rules or policies of the Board or the university in question at the time of the hires which would have explicitly permitted this transfer of accumulated sick and annual leave balances from the private nonprofit corporation to the university.

The grant of authority in N.D.C.C. § 54-06-14 for a state agency to formulate and adopt rules governing the granting of annual and sick leave also differs from the formal rulemaking authority granted to the Central Personnel Division in N.D.C.C. § 54-44.3-12. Id. Under the latter authority, formal administrative rules have been promulgated which permit a state entity employing an individual from another state agency to accept all or part of the employee's accrued annual and sick leave hours. See N.D. Admin. Code §§ 4-07-12-13 and 4-07-13-12. Those rules are silent regarding transfers of accumulated annual or sick leave balances from a private nonprofit corporation to a state entity.

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Moreover, N.D.C.C. § 54-06-14 does not explicitly authorize, in and of itself, a state entity to accept sick or annual leave balances accumulated while an employee was employed by a nongovernmental entity. That statute, however, does permit a certain amount of flexibility in establishing leave for employees who are hired under a written contract of hire setting forth the terms and conditions of employment. For example, in 1992 N.D. Op. Att'y Gen. 25, former Attorney General Nicholas J. Spaeth opined that N.D.C.C. § 54-06-14 allows a state employer to negotiate the type and amount of leave that may be accrued for an employee hired under a written contract. See also Letter from Attorney General Nicholas J. Spaeth to John A. Malmberg (May 17, 1990) (Bank of North Dakota permitted under N.D.C.C. § 56-04-14 to enter into written contract of hire setting forth terms and conditions of employment to provide for annual and sick leave benefits for temporary employees not otherwise entitled to such leave).

Thus, even though the general rule relating to state employee benefits requires the laws to be liberally construed to effectuate the end which the benefit aims to provide, id., it is my opinion that in the absence of any statute, written contract of hire specifying the terms and conditions of employment, or properly authorized rule or policy, a state entity is not authorized to accept sick or annual leave balances accumulated while an employee was employed by a private entity.

Sincerely,

Heidi Heitkamp
Attorney General

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