

**N.D.A.G. Letter to Tornes (March 7, 1989)**

March 7, 1989

Mr. Gary Tornes  
Director  
Central Personnel Division  
Office of Management and Budget  
State Capitol  
Bismarck, ND 58505

Dear Mr. Tornes:

Thank you for your October 14, 1988, letter in which you requested an Attorney General's opinion. I apologize for the delay in responding to your letter.

In your letter you ask for an Attorney General's opinion as to whether cash payments offered to an employee in lieu of health insurance benefits are part of the employee's salary. You indicate that a county social service board offered its employees the option of receiving health insurance benefits or cash payments in lieu of health insurance benefits. You also indicate that when the cash payment in lieu of health insurance benefits was added to the monthly salary of one of the employees electing to receive the cash payment, the total amount exceeded the maximum of the salary range for the employee's position. You believe that cash paid to an employee in lieu of health insurance benefits should be considered part of the employee's salary, which may not exceed the maximum of the salary range established for that position.

In 1981 N.D. Att'y Gen. 413, issued December 23, 1981, this office expressed the opinion that county social service boards, as federal grants-in-aid agencies, are required to follow the complete merit system provided for in N.D.C.C. ch. 54-42. N.D.C.C. § 54-42-03 provides that the Merit System Council, which consists of the Central Personnel Division and the State Personnel Board, shall establish general policies and rules, which shall be binding upon the agencies affected. These policies and rules cover such items as "classifications and compensation plans." N.D.C.C. § 54-42-03(2). Therefore, the Merit System Council has the authority to establish the classifications of and compensation plans for the employees of county social service boards.

The phrase "compensation plan" is not defined in N.D.C.C. ch. 54-42. Nor is there an Attorney General's opinion addressing the question of what is meant by the phrase as used in N.D.C.C. § 54-42-03. The term "compensation" as it is ordinarily understood includes at least an employee's base wage or salary. As I view the issue, cash payments given to a county social service board employee in lieu of health insurance benefits must be considered "salary" or "compensation" over which the Merit System Council has authority pursuant to N.D.C.C. § 54-42-03.

In Ekblad v. Williams County, 289 N.W. 90, 91 (N.D. 1939), the North Dakota Supreme Court quoted with approval the following definition of "salary":

Webster's International Dictionary defines salary as, "The recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services, esp. to holders of official, executive, or clerical positions; fixed compensation regularly paid, as by the year, quarter, month, or week, \* \* \* \*  
\*."

Your letter indicates that cash payments in lieu of health insurance benefits are paid to the employee each payroll cycle. Based upon the definition of "salary" quoted with approval by the North Dakota Supreme Court in Ekblad v. Williams County, it appears that the payments in question, being fixed payments paid at regular intervals, are "salary."

To conclude that the cash payments in lieu of health insurance benefits are not "salary" or "compensation" within the meaning of N.D.C.C. ch. 54-42 would defeat the purpose of the merit system and the merit system compensation plans. That purpose is to avoid unwarranted disparity between similarly situated employees. To hold that cash payments in lieu of fringe benefits are not "salary" or "compensation" would permit an employer to pay employees money over and above the salary established in the Merit System Council's compensation plan.

The conclusion that cash payments in lieu of health insurance benefits are "salary" and, hence, "compensation" within the meaning of N.D.C.C. § 54-42-03(2) does not mean that the availability of and an employee's participation in fringe benefit programs cannot be taken into consideration by the Merit System Council in establishing compensation plans. Furthermore, such a conclusion does not mean that the availability of and an employee's participation in fringe benefit programs cannot be considered by a merit system employer in setting a salary, as long as the salary is within the range established by the Merit System Council's compensation plan.

Based upon the foregoing, it is my conclusion that cash payments made to an employee of a county social service board in lieu of health insurance benefits are part of the "salary" of that employee. It is my further conclusion that the total amount received by the employee, including the compensation in lieu of the health insurance benefits, may not exceed the maximum compensation established for the employee's position by the Merit System Council.

I hope this information is helpful to you. Feel free to contact me if you have any further questions.

Sincerely,

Nicholas J. Spaeth

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