



MBJ RQ-476
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Texas Department of Health

David R. Smith, M.D.
Commissioner

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December 22, 1992

RQ-476 JAN 04 92

Act 1-7-93

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

Re: Request for Attorney General's Opinion

The purpose of this request is to seek resolution of an apparent conflict between the General Appropriations Act and Article 8307c, Worker's Compensation Act. The General Appropriations Act, Provisions on Employees' Vacations and Leaves, Section 8 (11) provides as follows:

II. Agencies may grant employees leave without pay or leave of absence without pay subject to the following provisions:

- a. Except for disciplinary and workers compensation situations all accumulated paid leave entitlements must be exhausted before granting such leaves, with the additional provisions that sick leave must be exhausted only in those cases where the employee is eligible to take sick leave, as provided in Section 8(2) above. Such leaves will be limited in duration to twelve (12) months.
- b. Subject to fiscal constraints, approval of such leaves constitutes a guarantee of employment for a specified period of time.
- c. The administrative head of an agency may grant exceptions to these limitations for such reasons as interagency agreements or educational purposes.
- d. Except in the case of an employee returning to state employment from military leave without pay, any full calendar month (i.e., from the first day of a month through the last day of a month, inclusive) in which an employee is on leave without pay, shall not be counted in the calculation of total state service for purposes of longevity pay or vacation leave entitlements. No employee shall accrue vacation or sick leave for such month. Further, any such full calendar month of leave without pay shall not constitute a break in continuity

of employment but shall not be included in the calculation of the six continuous months of employment set forth in the Act under both the merit salary provisions, Section 1(4)(f)(a) and under Employees Vacations and Leaves, Section 8(1) last paragraph.

Article 8307c V.T.C.S. prohibits discrimination or termination of an employee who in good faith has filed a claim under the Worker's Compensation Act. The Act provides as follows:

Section 1. No person may discharge or in other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Section 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

The Agency is concerned because the General Appropriations Act appears to prohibit an employee from being granted leave of absence or leave without pay past twelve (12) months. We have an employee who has filed in good faith a compensation claim who will need to be on leave without pay or leave of absence without pay for a period longer than twelve (12) months.

Our questions are as follows:

- 1) Is the agency required to terminate an employee who will need to be on leave without pay or leave of absence without pay for a period greater than twelve (12) months?**
- 2) If the agency terminates an employee simply because the employee needs leave without pay or leave of absence without pay in excess of twelve months, is that a violation of Article 8307c V.T.C.S.?**
- 3) If there is no legitimate independent reason for termination of the employee, may the agency extend the leave without pay or leave of absence without pay status beyond twelve (12) months?**

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A similar set of facts was addressed in Attorney General Opinion JM-227 which states as follows:

The Texas Department of Mental Health and Mental Retardation may not automatically terminate non-probationary employees who are collecting worker's compensation benefits and who are on leave of absence without pay for more than six weeks. The mere fact that an employee is in such status for a fixed period of time is not per se an adequate basis for terminating such an employee, and in the absence of a legitimate independent reason, such termination violates the state policy expressed in Article 8307c, Section 1, V.T.C.S.

If you need further information please contact Don R. Bradley of our Office of General Counsel at (512) 458-7236. Thank you for your consideration of this request.

Sincerely,

A handwritten signature in cursive script that reads "David R. Smith" followed by a stylized flourish.

**David R. Smith, M.D.
Commissioner of Health**