



Service Credit for Shared Leave Preliminary Follow-up Report

LEOFF Plan 2 Retirement Board

November 18, 2009

Key Issues

- Disparity between LEOFF employers and members regarding the pension treatment of shared leave.

State “leave sharing program”

- Who’s covered?
- What’s covered?
- How is shared leave treated?

Local Government Leave Sharing

- Who's covered?
- What's covered?
- How is leave treated?

Option

- Board chose option 2: “Shared Leave” as it is defined by the local bargaining agreement and would be considered earnable compensation like the state program.

Costs

- No supplemental rate

Summary

- Creates a disparity between LEOFF employers and members regarding the pension treatment of shared leave
 - State and higher education employees – shared leave is included.
 - Local government employees – shared leave is not included.
- No supplemental rate

Service Credit for Shared Leave

Questions?

LAW ENFORCEMENT OFFICERS' AND FIRE FIGHTERS' PLAN 2 RETIREMENT BOARD

Service Credit for Shared Leave Preliminary Follow-up Report

November 18, 2009

1. Issue

There is a disparity between LEOFF employers and members regarding the pension treatment of shared leave.

2. Staff

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3. Members Impacted

This would impact all members not working in either higher education or a state agency. According to the *2007 Actuarial Valuation Report* provided by the Office of the State Actuary, there are 16,099 active members as of June 30, 2007. Of those members, 208 members work for either a state agency or institution of higher education and 15,891 work for an employer other than a state agency or institution of higher education.

4. Current Situation

Many employers have “shared leave” programs which allow members to donate and receive sick leave or annual leave under certain conditions. The Department of Retirement Systems (DRS) has a long-standing policy that shared leave received from another employee is not considered “compensation earnable”, therefore the leave cannot be used for service credit or for computing final average salary (FAS).

However, when the state leave sharing program was created, the statute expressly provided for shared leave for state agency employees and employees of institutions of higher education to be treated the same for pension purposes as the employee’s own sick leave or annual leave. This allows those employees who work for employers covered by the state leave sharing program to have their shared leave used in the calculation of FAS and service credit.

5. Background Information and Policy Issues

Shared leave is a process whereby one or more employees may donate their own accumulated leave for the benefit of another employee.

The Washington State Legislature in 1989 recognized that “Employees historically have joined together to help their fellow employees who suffer from, or have relatives or household members suffering from, an extraordinary or severe illness, injury, impairment, or physical or mental condition which prevents the individual from working and causes great economic and emotional distress to the employee and his or her family”. In order to help mitigate those issues, the Legislature established a leave sharing program that covers employees working for state agencies, institutions of state government, the Legislature, institutions of higher education, school districts and educational service districts. Under the state leave sharing program, a member who is using shared leave “shall receive the same treatment in respect to salary, wages, and employee benefits as the employee would normally receive if using accrued annual leave or sick leave”. The program was intended to have no significant increased cost to the state. The specific statutes covering the state’s leave program can be found in RCWs 41.04.650 through 41.04.685 (see Appendix A).

In 1996 the Legislature mandated the Joint Legislative Audit and Review Committee (JLARC) to examine the state leave sharing program to determine whether or not the program was incurring significant cost to the state (see Appendix B for the complete report). The findings of that report did indicate there was a cost to the state for the plan, but the report did not look at the potential cost to the pension plans of including that leave in the service credit and final average salary calculations.

In addition to the state’s leave sharing program, many local governments have established some sort of “shared leave” program. These programs can be unique to each individual employer, so they can have a greater variety of conditions qualifying as shared leave. For example, they may have a shared leave bank where leave is donated to a bank and not to an individual.

DRS has a long standing practice that shared leave is not “earned” by the member receiving the shared leave and as such it cannot be used as “basic salary” for the purpose of calculating FAS or service credit. This practice is supported in part by a 1991 Attorney General’s Office (AGO) a formal opinion AGO 1991, Number 29 (see Appendix B). This practice no longer applies to those employees covered the state shared leave program, but does still apply to those members not covered under the state’s program. Although a member may not have their shared leave used in calculating FAS or service credit, the member could potentially purchase any lost service credit through the authorized leave of absence statutes. The member can request a bill from DRS for the lost service credit provided the leave was considered authorized by the employer, the member returns to work for at least one day and pays the bill in full prior to retirement.

Policy Issue

The disparity in LEOFF Plan 2 occurs because members who are employed by the state, such as the Department of Fish and Wildlife's Enforcement Officers, or higher education, such as police officers and firefighters employed at the University of Washington and Washington State University, will have their shared leave included in their FAS and service credit calculations while the majority of the members who work for local governments, fire districts or the port districts will not.

6. Options

Option 1: "Shared Leave", using the same definition as the state program, would be considered earnable compensation.

Under this option the LEOFF Plan 2 Retirement Board (Board) would propose legislation that would allow "shared leave" as defined in the state's Leave Sharing Program to be considered earnable compensation. This would ensure that if a member uses "shared leave" their retirement benefit calculation would not be adversely affected. "Shared leave" would be reported to DRS as salary with contributions withheld.

Option 2: "Shared Leave" as it is defined by the local bargaining agreement and would be considered earnable compensation like the state program.

Under this option the Board would propose legislation that would allow "shared leave" to be defined at the employer level within the bargaining agreement and the "shared leave" would be considered earnable compensation, same as it is in the state program. "Shared leave" would be reported to DRS as salary with contributions withheld. This change would be prospective. However, any shared leave previously reported to DRS would remain creditable. Members who previously did not have their shared leave reported to DRS would only be able to receive credit for that service if they are eligible to purchase it under the authorized leave of absence statutes.

Option 3: Create a method by which members could buy the service credit.

Under this option the Board would propose legislation that would allow members the option to purchase the service credit lost due to using shared leave. Under this proposal there would be no limit to the amount of service a member could purchase. The member could purchase the service at the time they return to work, but they would not need to return to work in order to qualify for the service credit. They could purchase it at the time of retirement.

Costs

At the September 23, 2009 meeting, the Board asked that costs be brought back for option 2.

When the Office of the State Actuary (OSA) values all members' accounts they assume each member will earn a full year of service and salary in each future year. However, experience shows not every member does earn a full year of salary and service. This creates a positive gain to the system. Part of this gain is certainly due to shared leave but it may also occur from other sources such as authorized leave without pay. If service credit for shared leave

becomes creditable then a portion of the savings will be lost. However, it should not impact contribution rates since they are set assuming each member will earn a full year of salary and service.

7. Supporting Information

Appendix A – Leave Sharing Statutes

Appendix B – Leave Sharing WACs

Appendix C – Office of the Attorney General, Opinion AGO 1991, No. 29

**Appendix D – Joint Legislative Audit and Review Committee: Leave
Sharing Report 97-7**

Appendix A – Leave Sharing Statutes

RCW 41.04.650

Leave sharing program — Intent.

The legislature finds that: (1) State employees historically have joined together to help their fellow employees who suffer from, or have relatives or household members suffering from, an extraordinary or severe illness, injury, impairment, or physical or mental condition which prevents the individual from working and causes great economic and emotional distress to the employee and his or her family; and (2) these circumstances may be exacerbated because the affected employees use all their accrued sick leave and annual leave and are forced to take leave without pay or terminate their employment. Therefore, the legislature intends to provide for the establishment of a leave sharing program.

[1989 c 93 § 1.]

Notes:

Severability -- 1989 c 93: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."
[1989 c 93 § 8.]

RCW 41.04.655

Leave sharing program — Definitions. (Effective until October 1, 2008.)

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW [41.04.650](#) through [41.04.670](#), [28A.400.380](#), and section 7, chapter 93, Laws of 1989.

(1) "Employee" means any employee of the state, including employees of school districts and educational service districts, who are entitled to accrue sick leave or annual leave and for whom accurate leave records are maintained.

(2) "Program" means the leave sharing program established in RCW [41.04.660](#).

(3) "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time national guard duty including state-ordered active duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

(4) "State agency" or "agency" means departments, offices, agencies, or institutions of state government, the legislature, institutions of higher education, school districts, and educational service districts.

(5) "Uniformed services" means the armed forces, the army national guard, and the air national guard of any state, territory, commonwealth, possession, or district when engaged in active duty for training, inactive duty training, full-time national guard duty, or state active duty, the commissioned corps of the public health service, the coast guard, and any other category of persons designated by the president of the United States in time of war or national emergency.

[2003 1st sp.s. c 12 § 1; 1990 c 33 § 569; 1989 c 93 § 2.]

Notes:

Effective date -- 2003 1st sp.s. c 12: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [June 20, 2003]." [2003 1st sp.s. c 12 § 4.]

Purpose -- Statutory references -- Severability -- 1990 c 33: See RCW [28A.900.100](#) through [28A.900.102](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.655

Leave sharing program — Definitions. (Effective October 1, 2008.)

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW [41.04.650](#) through [41.04.670](#), [28A.400.380](#), and section 7, chapter 93, Laws of 1989.

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault, between family or household members as defined in RCW [26.50.010](#); (b) sexual assault of one family or household member by another family or household member; or (c) stalking as defined in RCW [9A.46.110](#) of one family or household member by another family or household member.

(2) "Employee" means any employee of the state, including employees of school districts and educational service districts, who are entitled to accrue sick leave or annual leave and for whom accurate leave records are maintained.

(3) "Program" means the leave sharing program established in RCW [41.04.660](#).

(4) "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time national guard duty including state-ordered active duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

(5) "Sexual assault" has the same meaning as set forth in RCW [70.125.030](#).

(6) "Stalking" has the same meaning as set forth in RCW [9A.46.110](#).

(7) "State agency" or "agency" means departments, offices, agencies, or institutions of state government, the legislature, institutions of higher education, school districts, and educational service districts.

(8) "Uniformed services" means the armed forces, the army national guard, and the air national guard of any state, territory, commonwealth, possession, or district when engaged in active duty for training, inactive duty training, full-time national guard duty, or state active duty, the commissioned corps of the public health service, the coast guard, and any other category of persons designated by the president of the United States in time of war or national emergency.

(9) "Victim" means a person against whom domestic violence, sexual assault, or stalking has been committed as defined in this section.

[2008 c 36 § 1; 2003 1st sp.s. c 12 § 1; 1990 c 33 § 569; 1989 c 93 § 2.]

Notes:

Effective date -- 2008 c 36: "This act takes effect October 1, 2008." [2008 c 36 § 4.]

Effective date -- 2003 1st sp.s. c 12: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [June 20, 2003]." [2003 1st sp.s. c 12 § 4.]

Purpose -- Statutory references -- Severability -- 1990 c 33: See RCW [28A.900.100](#) through [28A.900.102](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.660

Leave sharing program — Created. (Effective until October 1, 2008.)

The Washington state leave sharing program is hereby created. The purpose of the program is to permit state employees, at no significantly increased cost to the state of providing annual leave, sick leave, or personal holidays, to come to the aid of a fellow state employee who is suffering from or has a relative or household member suffering from an extraordinary or severe illness, injury, impairment, or physical or mental condition, or who has been called to service in the uniformed services, which has caused or is likely to cause the employee to take leave without pay or terminate his or her employment.

[2003 1st sp.s. c 12 § 2; 1996 c 176 § 2; 1990 c 23 § 1; 1989 c 93 § 3.]

Notes:

Effective date -- 2003 1st sp.s. c 12: See note following RCW [41.04.655](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.660

Leave sharing program — Created. (Effective October 1, 2008.)

The Washington state leave sharing program is hereby created. The purpose of the program is to permit state employees, at no significantly increased cost to the state of providing annual leave, sick leave, or personal holidays, to come to the aid of a fellow state employee who is suffering from or has a relative or household member suffering from an extraordinary or severe illness, injury, impairment, or physical or mental condition; a fellow state employee who is a victim of domestic violence, sexual assault, or stalking; or a fellow state employee who has been called to service in the uniformed services, which has caused or is likely to cause the employee to take leave without pay or terminate his or her employment.

[2008 c 36 § 2; 2003 1st sp.s. c 12 § 2; 1996 c 176 § 2; 1990 c 23 § 1; 1989 c 93 § 3.]

Notes:

Effective date -- 2008 c 36: See note following RCW [41.04.655](#).

Effective date -- 2003 1st sp.s. c 12: See note following RCW [41.04.655](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.665

Leave sharing program — When employee may receive leave — When employee may transfer accrued leave — Transfer of leave between employees of different agencies. (Effective until October 1, 2008.)

(1) An agency head may permit an employee to receive leave under this section if:

(a)(i) The employee suffers from, or has a relative or household member suffering from, an illness, injury, impairment, or physical or mental condition which is of an extraordinary or severe nature;

(ii) The employee has been called to service in the uniformed services; or

(iii) A state of emergency has been declared anywhere within the United States by the federal or any state government and the employee has needed skills to assist in responding to the emergency or its aftermath and volunteers his or her services to either a governmental agency or to a nonprofit organization engaged in humanitarian relief in the devastated area, and the governmental agency or nonprofit organization accepts the employee's offer of volunteer services;

(b) The illness, injury, impairment, condition, call to service, or emergency volunteer service has caused, or is likely to cause, the employee to:

(i) Go on leave without pay status; or

(ii) Terminate state employment;

(c) The employee's absence and the use of shared leave are justified;

(d) The employee has depleted or will shortly deplete his or her:

(i) Annual leave and sick leave reserves if he or she qualifies under (a)(i) of this subsection;

(ii) Annual leave and paid military leave allowed under RCW [38.40.060](#) if he or she qualifies under (a)(ii) of this subsection; or

(iii) Annual leave if he or she qualifies under (a)(iii) of this subsection;

(e) The employee has abided by agency rules regarding:

(i) Sick leave use if he or she qualifies under (a)(i) of this subsection; or

(ii) Military leave if he or she qualifies under (a)(ii) of this subsection; and

(f) The employee has diligently pursued and been found to be ineligible for benefits under chapter [51.32](#) RCW if he or she qualifies under (a)(i) of this subsection.

(2) The agency head shall determine the amount of leave, if any, which an employee may receive under this section. However, an employee shall not receive a total of more than two hundred sixty-one days of leave, except that shared leave received under the uniformed service shared leave pool in RCW [41.04.685](#) is not included in this total.

(3) An employee may transfer annual leave, sick leave, and his or her personal holiday, as follows:

(a) An employee who has an accrued annual leave balance of more than ten days may request that the head of

the agency for which the employee works transfer a specified amount of annual leave to another employee authorized to receive leave under subsection (1) of this section. In no event may the employee request a transfer of an amount of leave that would result in his or her annual leave account going below ten days. For purposes of this subsection (3)(a), annual leave does not accrue if the employee receives compensation in lieu of accumulating a balance of annual leave.

(b) An employee may transfer a specified amount of sick leave to an employee requesting shared leave only when the donating employee retains a minimum of one hundred seventy-six hours of sick leave after the transfer.

(c) An employee may transfer, under the provisions of this section relating to the transfer of leave, all or part of his or her personal holiday, as that term is defined under RCW [1.16.050](#), or as such holidays are provided to employees by agreement with a school district's board of directors if the leave transferred under this subsection does not exceed the amount of time provided for personal holidays under RCW [1.16.050](#).

(4) An employee of an institution of higher education under RCW [28B.10.016](#), school district, or educational service district who does not accrue annual leave but does accrue sick leave and who has an accrued sick leave balance of more than twenty-two days may request that the head of the agency for which the employee works transfer a specified amount of sick leave to another employee authorized to receive leave under subsection (1) of this section. In no event may such an employee request a transfer that would result in his or her sick leave account going below twenty-two days. Transfers of sick leave under this subsection are limited to transfers from employees who do not accrue annual leave. Under this subsection, "sick leave" also includes leave accrued pursuant to RCW [28A.400.300](#)(2) or [28A.310.240](#) (1) with compensation for illness, injury, and emergencies.

(5) Transfers of leave made by an agency head under subsections (3) and (4) of this section shall not exceed the requested amount.

(6) Leave transferred under this section may be transferred from employees of one agency to an employee of the same agency or, with the approval of the heads of both agencies, to an employee of another state agency. However, leave transferred to or from employees of school districts or educational service districts is limited to transfers to or from employees within the same employing district.

(7) While an employee is on leave transferred under this section, he or she shall continue to be classified as a state employee and shall receive the same treatment in respect to salary, wages, and employee benefits as the employee would normally receive if using accrued annual leave or sick leave.

(a) All salary and wage payments made to employees while on leave transferred under this section shall be made by the agency employing the person receiving the leave. The value of leave transferred shall be based upon the leave value of the person receiving the leave.

(b) In the case of leave transferred by an employee of one agency to an employee of another agency, the agencies involved shall arrange for the transfer of funds and credit for the appropriate value of leave.

(i) Pursuant to rules adopted by the office of financial management, funds shall not be transferred under this section if the transfer would violate any constitutional or statutory restrictions on the funds being transferred.

(ii) The office of financial management may adjust the appropriation authority of an agency receiving funds under this section only if and to the extent that the agency's existing appropriation authority would prevent it from expending the funds received.

(iii) Where any questions arise in the transfer of funds or the adjustment of appropriation authority, the director of financial management shall determine the appropriate transfer or adjustment.

(8) Leave transferred under this section shall not be used in any calculation to determine an agency's allocation of full time equivalent staff positions.

(9) The value of any leave transferred under this section which remains unused shall be returned at its original value to the employee or employees who transferred the leave when the agency head finds that the leave is no longer needed or will not be needed at a future time in connection with the illness or injury for which the leave was transferred or for any other qualifying condition. Before the agency head makes a determination to return unused leave in connection with an illness or injury, or any other qualifying condition, he or she must receive from the

affected employee a statement from the employee's doctor verifying that the illness or injury is resolved. To the extent administratively feasible, the value of unused leave which was transferred by more than one employee shall be returned on a pro rata basis.

(10) An employee who uses leave that is transferred to him or her under this section may not be required to repay the value of the leave that he or she used.

[2007 c 454 § 1; 2007 c 25 § 2; 2003 1st sp.s. c 12 § 3; 1999 c 25 § 1; 1996 c 176 § 1; 1990 c 23 § 2; 1989 c 93 § 4.]

Notes:

Reviser's note: This section was amended by 2007 c 25 § 2 and by 2007 c 454 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW [1.12.025](#)(2). For rule of construction, see RCW [1.12.025](#)(1).

Severability -- Effective date -- 2007 c 25: See notes following RCW [41.04.685](#).

Effective date -- 2003 1st sp.s. c 12: See note following RCW [41.04.655](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.665

Leave sharing program — When employee may receive leave — When employee may transfer accrued leave — Transfer of leave between employees of different agencies. (Effective October 1, 2008.)

(1) An agency head may permit an employee to receive leave under this section if:

(a)(i) The employee suffers from, or has a relative or household member suffering from, an illness, injury, impairment, or physical or mental condition which is of an extraordinary or severe nature;

(ii) The employee has been called to service in the uniformed services;

(iii) A state of emergency has been declared anywhere within the United States by the federal or any state government and the employee has needed skills to assist in responding to the emergency or its aftermath and volunteers his or her services to either a governmental agency or to a nonprofit organization engaged in humanitarian relief in the devastated area, and the governmental agency or nonprofit organization accepts the employee's offer of volunteer services; or

(iv) The employee is a victim of domestic violence, sexual assault, or stalking;

(b) The illness, injury, impairment, condition, call to service, emergency volunteer service, or consequence of domestic violence, sexual assault, or stalking has caused, or is likely to cause, the employee to:

(i) Go on leave without pay status; or

(ii) Terminate state employment;

(c) The employee's absence and the use of shared leave are justified;

(d) The employee has depleted or will shortly deplete his or her:

(i) Annual leave and sick leave reserves if he or she qualifies under (a)(i) of this subsection;

(ii) Annual leave and paid military leave allowed under RCW [38.40.060](#) if he or she qualifies under (a)(ii) of this subsection; or

(iii) Annual leave if he or she qualifies under (a)(iii) or (iv) of this subsection;

(e) The employee has abided by agency rules regarding:

(i) Sick leave use if he or she qualifies under (a)(i) or (iv) of this subsection; or

(ii) Military leave if he or she qualifies under (a)(ii) of this subsection; and

(f) The employee has diligently pursued and been found to be ineligible for benefits under chapter [51.32](#) RCW if he or she qualifies under (a)(i) of this subsection.

(2) The agency head shall determine the amount of leave, if any, which an employee may receive under this section. However, an employee shall not receive a total of more than two hundred sixty-one days of leave, except that shared leave received under the uniformed service shared leave pool in RCW [41.04.685](#) is not included in this total.

(3) An employee may transfer annual leave, sick leave, and his or her personal holiday, as follows:

(a) An employee who has an accrued annual leave balance of more than ten days may request that the head of the agency for which the employee works transfer a specified amount of annual leave to another employee authorized to receive leave under subsection (1) of this section. In no event may the employee request a transfer of an amount of leave that would result in his or her annual leave account going below ten days. For purposes of this subsection (3)(a), annual leave does not accrue if the employee receives compensation in lieu of accumulating a balance of annual leave.

(b) An employee may transfer a specified amount of sick leave to an employee requesting shared leave only when the donating employee retains a minimum of one hundred seventy-six hours of sick leave after the transfer.

(c) An employee may transfer, under the provisions of this section relating to the transfer of leave, all or part of his or her personal holiday, as that term is defined under RCW [1.16.050](#), or as such holidays are provided to employees by agreement with a school district's board of directors if the leave transferred under this subsection does not exceed the amount of time provided for personal holidays under RCW [1.16.050](#).

(4) An employee of an institution of higher education under RCW [28B.10.016](#), school district, or educational service district who does not accrue annual leave but does accrue sick leave and who has an accrued sick leave balance of more than twenty-two days may request that the head of the agency for which the employee works transfer a specified amount of sick leave to another employee authorized to receive leave under subsection (1) of this section. In no event may such an employee request a transfer that would result in his or her sick leave account going below twenty-two days. Transfers of sick leave under this subsection are limited to transfers from employees who do not accrue annual leave. Under this subsection, "sick leave" also includes leave accrued pursuant to RCW [28A.400.300](#)(2) or [28A.310.240](#) (1) with compensation for illness, injury, and emergencies.

(5) Transfers of leave made by an agency head under subsections (3) and (4) of this section shall not exceed the requested amount.

(6) Leave transferred under this section may be transferred from employees of one agency to an employee of the same agency or, with the approval of the heads of both agencies, to an employee of another state agency. However, leave transferred to or from employees of school districts or educational service districts is limited to transfers to or from employees within the same employing district.

(7) While an employee is on leave transferred under this section, he or she shall continue to be classified as a state employee and shall receive the same treatment in respect to salary, wages, and employee benefits as the employee would normally receive if using accrued annual leave or sick leave.

(a) All salary and wage payments made to employees while on leave transferred under this section shall be made by the agency employing the person receiving the leave. The value of leave transferred shall be based upon the leave value of the person receiving the leave.

(b) In the case of leave transferred by an employee of one agency to an employee of another agency, the agencies involved shall arrange for the transfer of funds and credit for the appropriate value of leave.

(i) Pursuant to rules adopted by the office of financial management, funds shall not be transferred under this section if the transfer would violate any constitutional or statutory restrictions on the funds being transferred.

(ii) The office of financial management may adjust the appropriation authority of an agency receiving funds under this section only if and to the extent that the agency's existing appropriation authority would prevent it from expending the funds received.

(iii) Where any questions arise in the transfer of funds or the adjustment of appropriation authority, the director of financial management shall determine the appropriate transfer or adjustment.

(8) Leave transferred under this section shall not be used in any calculation to determine an agency's allocation of full time equivalent staff positions.

(9) The value of any leave transferred under this section which remains unused shall be returned at its original value to the employee or employees who transferred the leave when the agency head finds that the leave is no longer needed or will not be needed at a future time in connection with the illness or injury for which the leave was transferred or for any other qualifying condition. Before the agency head makes a determination to return unused leave in connection with an illness or injury, or any other qualifying condition, he or she must receive from the affected employee a statement from the employee's doctor verifying that the illness or injury is resolved. To the extent administratively feasible, the value of unused leave which was transferred by more than one employee shall be returned on a pro rata basis.

(10) An employee who uses leave that is transferred to him or her under this section may not be required to repay the value of the leave that he or she used.

[2008 c 36 § 3. Prior: 2007 c 454 § 1; 2007 c 25 § 2; 2003 1st sp.s. c 12 § 3; 1999 c 25 § 1; 1996 c 176 § 1; 1990 c 23 § 2; 1989 c 93 § 4.]

Notes:

Effective date -- 2008 c 36: See note following RCW [41.04.655](#).

Severability -- Effective date -- 2007 c 25: See notes following RCW [41.04.685](#).

Effective date -- 2003 1st sp.s. c 12: See note following RCW [41.04.655](#).

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

RCW 41.04.670

Leave sharing program — Adoption of rules.

The Washington personnel resources board and other personnel authorities shall each adopt rules applicable to employees under their respective jurisdictions: (1) Establishing appropriate parameters for the program which are consistent with the provisions of RCW [41.04.650](#) through [41.04.665](#); (2) providing for equivalent treatment of employees between their respective jurisdictions and allowing transfers of leave in accordance with RCW [41.04.665](#)(5); (3) establishing procedures to ensure that the program does not significantly increase the cost of providing leave; and (4) providing for the administration of the program and providing for maintenance and collection of sufficient information on the program to allow a thorough legislative review.

[1993 c 281 § 18; 1990 c 23 § 3; 1989 c 93 § 5.]

Notes:

Effective date -- 1993 c 281: See note following RCW [41.06.022](#).

Temporary policies -- 1989 c 93: "School districts, the department of personnel, the higher education personnel board, and other personnel authorities may adopt temporary emergency policies and procedures to implement the program on April 20, 1989, so that donated leave may be used in lieu of leave without pay taken after April 20, 1989." [1989 c 93 § 7.]

Severability -- 1989 c 93: See note following RCW [41.04.650](#).

APPENDIX B – Leave Sharing WACs

WAC 357-31-380

Agency filings affecting this section

What is the purpose of the state leave sharing program?

The purpose of the state leave sharing program is to permit state employees, at no significantly increased cost to the state for providing leave, to come to the aid of another state employee who is likely to take leave without pay or terminate his or her employment because:

- (1) The employee has been called to service in the uniformed services;
- (2) The employee is volunteering with a governmental agency or a nonprofit organization when a state of emergency has been declared within the United States;
- (3) The employee or a relative or household member is suffering from an extraordinary or severe illness, injury, impairment, or physical or mental condition; or
- (4) The employee is a victim of domestic violence, sexual assault, or stalking as defined in RCW 41.04.655.

[Statutory Authority: Chapter 41.06 RCW. 08-15-043, § 357-31-380, filed 7/11/08, effective 10/1/08; 08-07-063, § 357-31-380, filed 3/17/08, effective 4/18/08; 05-08-139, § 357-31-380, filed 4/6/05, effective 7/1/05.]

WAC 357-31-390

Agency filings affecting this section

What criteria does an employee have to meet to be eligible to receive shared leave?

An employee may be eligible to receive shared leave if the agency head or higher education institution president has determined the employee meets the following criteria:

- (1) The employee:
 - (a) Suffers from, or has a relative or household member suffering from, an illness, injury, impairment, or physical or mental condition which is of an extraordinary or severe nature;
 - (b) The employee has been called to service in the uniformed services;
 - (c) A state of emergency has been declared anywhere within the United States by the federal or any state government and the employee has the needed skills to assist in responding to the emergency or its aftermath and volunteers his/her services to either a governmental agency or to a nonprofit organization engaged in humanitarian relief in the devastated area, and the governmental agency or nonprofit organization accepts the employee's offer of volunteer services; or
 - (d) The employee is a victim of domestic violence, sexual assault, or stalking as defined in RCW 41.04.655.
- (2) The illness, injury, impairment, condition, call to service, or emergency volunteer service, or consequence of domestic violence, sexual assault, or stalking has caused, or is likely to cause, the employee to:
 - (a) Go on leave without pay status; or
 - (b) Terminate state employment.
- (3) The employee's absence and the use of shared leave are justified.
- (4) The employee has depleted or will shortly deplete his or her:

(a) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and accrued sick leave if the employee qualifies under subsection (1)(a) of this section; or

(b) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and paid military leave allowed under RCW 38.40.060 if the employee qualifies under subsection (1)(b) of this section; or

(c) Compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, and accrued vacation leave if the employee qualifies under (1)(c) or (d) of this section.

(5) The employee has abided by employer rules regarding:

(a) Sick leave use if the employee qualifies under subsection (1)(a) of this section; or

(b) Military leave if the employee qualifies under subsection (1)(b) of this section.

(6) If the illness or injury is work-related and the employee has diligently pursued and been found to be ineligible for benefits under chapter 51.32 RCW if the employee qualifies under subsection (1)(a) of this section.

[Statutory Authority: Chapter 41.06 RCW. 08-15-043, § 357-31-390, filed 7/11/08, effective 10/1/08; 08-07-063, § 357-31-390, filed 3/17/08, effective 4/18/08; 07-17-126, § 357-31-390, filed 8/20/07, effective 9/20/07; 05-08-139, § 357-31-390, filed 4/6/05, effective 7/1/05.]

WAC 357-31-395

Agency filings affecting this section

What definitions apply to shared leave?

(1) "Employee" means any employee who is entitled to accrue sick leave or vacation leave and for whom accurate leave records are maintained.

(2) "Employee's relative" normally must be limited to the employee's spouse, child, grandchild, grandparent, or parent.

(3) "Severe" or "extraordinary" condition is defined as serious or extreme and/or life threatening.

(4) "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time national guard duty including state-ordered active duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

(5) "Uniformed services" means the armed forces, the army national guard, and the air national guard of any state, territory, commonwealth, possession, or district when engaged in active duty for training, inactive duty training, full-time national guard duty, or state active duty, the commissioned corps of the public health service, the coast guard, and any other category of persons designated by the President of the United States in time of war or national emergency.

[Statutory Authority: Chapter 41.06 RCW. 05-08-139, § 357-31-395, filed 4/6/05, effective 7/1/05.]

WAC 357-31-400

Agency filings affecting this section

How much shared leave may an employee receive?

The employer determines the amount of leave, if any, which an employee may receive under these rules. However, an employee must not receive more than two hundred sixty-one days of shared leave during total state employment and a nonpermanent employee who is eligible to use accrued leave or personal holiday may not use shared leave beyond the expected end date of the appointment. Leave used under the sick leave pool program, as described in WAC 357-31-570, is included in the two hundred sixty-one day limit.

Employers are encouraged to consider other methods of accommodating the employee's needs such as modified

duty, modified hours, flex-time, or special assignments in place of shared leave.

[Statutory Authority: Chapter 41.06 RCW. 07-11-095, § 357-31-400, filed 5/16/07, effective 7/1/07; 05-08-139, § 357-31-400, filed 4/6/05, effective 7/1/05.]

WAC 357-31-405

Agency filings affecting this section

What documentation may an employee seeking shared leave be required to submit?

(1) For employees seeking shared leave under WAC 357-31-390 (1)(a), the employer may require the employee to submit a medical certificate from a licensed physician or health care practitioner verifying the severe or extraordinary nature and expected duration of the condition before the employer approves or disapproves the request.

(2) For employees seeking shared leave under WAC 357-31-390 (1)(b), the employer may require the employee to submit a copy of the military orders verifying the employee's required absence before the employer approves or disapproves the request.

(3) For employees seeking shared leave under WAC 357-31-390 (1)(c), proof of acceptance of an employee's offer to volunteer for either a governmental agency or a nonprofit organization during a declared state of emergency.

(4) For employees seeking shared leave under WAC 357-31-390 (1)(d), the employer may require that the request be supported by documentation. An employee may satisfy the verification requirement by providing the employer with one or more of the following:

(a) A police report indicating that the employee was a victim of domestic violence, sexual assault, or stalking;

(b) A court order protecting or separating the employee from the perpetrator of the act of domestic violence, sexual assault, or stalking;

(c) Evidence from the court or prosecuting attorney that the employee appeared or is scheduled to appear in court in connection with an incident of domestic violence, sexual assault, or stalking;

(d) An employee's written statement that the employee is a victim of domestic violence, sexual assault, or stalking;
or

(e) Documentation that the employee is a victim of domestic violence, sexual assault, or stalking, from any of the following persons from whom the employee or employee's family member sought assistance in addressing the domestic violence, sexual assault, or stalking: An advocate for victims of domestic violence, sexual assault, or stalking; an attorney; a member of the clergy; or a medical or other professional.

[Statutory Authority: Chapter 41.06 RCW. 08-15-043, § 357-31-405, filed 7/11/08, effective 10/1/08; 07-17-126, § 357-31-405, filed 8/20/07, effective 9/20/07; 05-08-139, § 357-31-405, filed 4/6/05, effective 7/1/05.]

WAC 357-31-410

Agency filings affecting this section

May employees donate leave to employees in other agencies, institutions of higher education, or related higher education boards?

Leave donated under the civil service rules and shared leave statutes may be transferred from employees of one employer to an employee of the same employer or, with the approval of the heads of both employers, to an employee of another state employer.

[Statutory Authority: Chapter 41.06 RCW. 05-08-139, § 357-31-410, filed 4/6/05, effective 7/1/05.]

WAC 357-31-415

[Agency filings affecting this section](#)

Can donated leave be used for any purpose?

Vacation leave, sick leave, or all or part of a personal holiday transferred from a donating employee under these rules must be used solely for the purpose stated in WAC [357-31-380](#).

[Statutory Authority: Chapter [41.06](#) RCW. 05-08-139, § 357-31-415, filed 4/6/05, effective 7/1/05.]

WAC 357-31-420

[Agency filings affecting this section](#)

What rate of pay is the employee receiving shared leave paid?

The receiving employee is paid his/her regular rate of pay. Therefore, the value of one hour of shared leave may cover more or less than one hour of the recipient's salary.

[Statutory Authority: Chapter [41.06](#) RCW. 05-08-139, § 357-31-420, filed 4/6/05, effective 7/1/05.]

WAC 357-31-425

[Agency filings affecting this section](#)

What types of leave can an employee donate for the purposes of the state leave sharing program?

An employee may donate vacation leave, sick leave, or all or part of a personal holiday to another employee for purposes of the state leave sharing program under the following conditions:

(1) Vacation leave: The donating employee's employer approves the employee's request to donate a specified amount of vacation leave to an employee authorized to receive shared leave and the full-time employee's request to donate leave will not cause his/her vacation leave balance to fall below eighty hours after the transfer. For part-time employees, requirements for vacation leave balances are prorated.

(2) Sick leave: The donating employee's employer approves the employee's request to donate a specified amount of sick leave to an employee authorized to receive shared leave and the employee's request to donate leave will not cause his/her sick leave balance to fall below one hundred seventy-six hours after the transfer.

(3) Personal holiday: The donating employee's employer approves the employee's request to donate all or part of his or her personal holiday to an employee authorized to receive shared leave.

Any portion of a personal holiday that is accrued, donated as shared leave, and then returned during the same calendar year to the donating employee, may be taken by the donating employee.

[Statutory Authority: Chapter [41.06](#) RCW. 05-08-139, § 357-31-425, filed 4/6/05, effective 7/1/05.]

WAC 357-31-430

[Agency filings affecting this section](#)

How will shared leave be administered?

The calculation of the recipient's leave value must be in accordance with applicable office of financial management policies, regulations, and procedures. The dollar value of the leave is converted from the donor to the recipient. The leave received is coded as shared leave and is maintained separately from all other leave balances.

[Statutory Authority: Chapter [41.06](#) RCW. 05-08-139, § 357-31-430, filed 4/6/05, effective 7/1/05.]

WAC 357-31-435

Must employees use their own leave before using shared leave?

Employees who qualify for shared leave under WAC 357-31-390 (1)(a) must first use all compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, sick leave, and vacation leave that they have accrued before using shared leave. Employees who qualify under WAC 357-31-390 (1)(b) must first use all of their compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, accrued vacation leave, and paid military leave allowed under RCW 38.40.060 before using shared leave. Employees who qualify under WAC 357-31-390 (1)(c) and (d) must first use all compensatory time, recognition leave as described in WAC 357-31-565, personal holiday, and vacation leave that they have accrued before using shared leave.

[Statutory Authority: Chapter 41.06 RCW. 08-15-043, § 357-31-435, filed 7/11/08, effective 10/1/08; 08-07-063, § 357-31-435, filed 3/17/08, effective 4/18/08; 05-08-139, § 357-31-435, filed 4/6/05, effective 7/1/05.]

WAC 357-31-440

How must employees who are receiving shared leave be treated during their absence?

An employee using shared leave under these rules continues to be classified as a state employee and receives the same treatment in respect to salary, wages, and employee benefits as the employee would normally receive if using accrued vacation leave or sick leave.

Employees who, during their probationary period or trial service period, go on shared leave must have their probationary period or trial service period extended by the number of calendar days they are on shared leave.

[Statutory Authority: Chapter 41.06 RCW. 05-08-139, § 357-31-440, filed 4/6/05, effective 7/1/05.]

WAC 357-31-445

What happens to leave that was donated under the state leave sharing program and was not used by the recipient?

(1) Any shared leave not used by the recipient during each incident/occurrence as determined by the employer must be returned to the donor(s).

If shared leave has been granted under WAC 357-31-390 (1)(a), before the employer makes a determination to return the unused leave to the donor(s) the employer must receive from the affected employee's licensed physician or health care practitioner a statement verifying that the employee is released to return to work.

The remaining shared leave must be returned to the donors and reinstated to the respective donors' appropriate leave balances based on each employee's current salary rate at the time of the reversion. The shared leave returned must be returned in accordance with office of financial management policies.

(2) Unused shared leave may not be cashed out by a recipient.

[Statutory Authority: Chapter 41.06 RCW. 07-17-126, § 357-31-445, filed 8/20/07, effective 9/20/07; 05-08-139, § 357-31-445, filed 4/6/05, effective 7/1/05.]

WAC 357-31-450

Agency filings affecting this section

Must an employee who receives shared leave repay the value of the leave that he or she used?

An employee who uses leave that is donated under the state leave sharing program is not required to repay the value of the leave that he or she used.

[Statutory Authority: Chapter 41.06 RCW. 05-08-139, § 357-31-450, filed 4/6/05, effective 7/1/05.]

WAC 357-31-455

Agency filings affecting this section

What records must an employer maintain pertaining to the state leave sharing program?

Agencies must maintain records which contain sufficient information to provide for any state review.

[Statutory Authority: Chapter 41.06 RCW. 05-08-139, § 357-31-455, filed 4/6/05, effective 7/1/05.]

**Appendix C – Office of the Attorney General, Opinion AGO 1991, No. 29
AGO 1991 No. 29 - September 23, 1991**



Ken Eikenberry | 1981-1992 | Attorney General of Washington

PUBLIC FUNDS -- ANNUAL LEAVE -- SICK LEAVE -- COUNTIES -- PUBLIC EMPLOYEES RETIREMENT SYSTEM -- Applicability of Gift of Public Funds Prohibition and Contribution Requirements for Public Employees Retirement System to County Sick Leave Bank.

1. There is a proposal by a county to establish a sick leave bank. Under the proposal employees who have accrued vacation leave or sick leave may donate the leave to the sick leave bank. In the event of catastrophic illness or injury, employees who have exhausted their vacation leave and sick leave may apply to the sick leave bank for additional leave. Article 8, section 7 of the Washington Constitution prohibits gifts of public funds. The proposal is not a gift by the county. There is consideration to the county since the donating employees performed service in order to accrue the donated leave. There is donative intent on the part of the donating employee, not the county.
2. Under RCW 41.40.010(8)(a), (b), vacation leave and sick leave donated to the sick leave bank are not compensation earnable of the employee making the donation. Although the employee accrues the leave, he or she is never paid for it.
3. Under RCW 41.40.010(8)(a), (b), leave paid from the sick leave bank is not compensation earnable. Although the employee receives payments from the sick leave bank, the payments are not made in return for services to the county by the receiving employee. The leave was accrued as a result of services performed by the donating employee.

September 23, 1991

Honorable John W. Ladenburg
Pierce County Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

Cite as: AGO 1991 No. 29

Dear Mr. Ladenburg:

By letter previously acknowledged, you requested our opinion regarding a proposal by Pierce County to establish a Humanitarian [[Orig. Op. Page 2]] Catastrophic Sick Leave Bank. Under the proposal, county employees may donate accrued vacation or sick leave to the sick leave

bank. Under certain circumstances, the county will pay the donated leave to other county employees. We paraphrase your questions:

1. Does the county's payment to some employees of leave donated to the sick leave bank by other employees violate article 8, section 7 of the Washington Constitution, which prohibits gifts of public funds?

2. Is leave that is donated to the sick leave bank by a county employee compensation earnable under RCW 41.40.010(8) of the employee donating the leave?

3. Is leave paid from the sick leave bank to a county employee compensation earnable under RCW 41.40.010(8) of the employee receiving the leave?

We answer each of your questions no.

BACKGROUND

According to your letter, the county is concerned that some employees exhaust leave benefits when faced with catastrophic illness or injury. To deal with this problem the county is considering the establishment of a Humanitarian Catastrophic Sick Leave Bank.

Under the proposal, county employees may donate accrued vacation leave or sick leave to the sick leave bank.^{1/}

County employees accrue vacation and sick leave benefits as provided in the county ordinance. See Pierce County Ordinance chapters 3.72 and 3.68.

Under the proposal, employees who donate leave to the sick leave bank waive all rights to the donated leave. If the county discontinues the program, unused leave donations are forfeited. Donations and use of leave are on an hour-for-hour basis, without any conversion for differentials between rates of pay received by the donors and the recipients.

Any county employee eligible to accrue and use sick leave benefits may apply for leave donated to the bank. However, there [[Orig. Op. Page 3]] is no right to withdraw leave donated to the bank. A special committee must approve applications to use donated leave. Payments from the sick leave bank are made only in the event of catastrophic illness or injury. To qualify, the employee also must exhaust his or her available sick leave and vacation leave.

Vacation and sick leave hours donated to the sick leave bank provide the source of funds for the program. Use of the sick leave bank is limited to the available pool of hours donated by other employees. Leave awarded from the sick leave bank is on a first come, first serve basis to the extent of the available donated hours. If the employee's application is approved, the employee is paid, subject to availability of donated leave, according to the employee's regular rate of pay. However, if the employee's injury or illness qualifies for state workers' compensation, the employee receives

donated sick leave only for the difference between the employee's regular pay and the amount paid under state workers' compensation benefits.

ANALYSIS

Question 1:

Does the county's payment to some employees of leave donated to the sick leave bank by other employees violate article 8, section 7 of the Washington Constitution, which prohibits gifts of public funds?

Article 8, section 7 prohibits local governments from making gifts of public funds.

Article 8, section 7 of the Washington Constitution, provides:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

In Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 785 P.2d 447 (1990), the court set out a two-prong test by which to judge whether a public expenditure violates article 8, section 7. First, when funds are expended by the government in carrying out its fundamental purposes, no gift occurs. 114 Wn.2d at 39.

[[Orig. Op. Page 4]]

Second, if the expenditure is not for a fundamental governmental purpose, two factors must be considered to determine whether a gift has been made: consideration and donative intent. 114 Wn.2d at 39. If the expenditure is made without consideration and with donative intent, it is an impermissible gift. Moreover, these two factors are related. The court looks for donative intent to determine how closely to scrutinize sufficiency of the consideration. Unless there is proof of donative intent or grossly inadequate return, courts do not inquire into the adequacy of consideration.

In our opinion, the program about which you inquire would not constitute a gift of public funds. The services provided to the county by the employees who donate the leave is consideration for the program. The source of funds for the sick leave bank is the hours of vacation and sick leave donated by county employees. The donating employees accrue these hours of leave that may be transferred to the sick leave bank for use by qualifying employees. Additionally, there is no donative intent on the part of the county.^{2/}

The court long has held that payments to employees for services rendered do not constitute a gift. In Luders v. Spokane, 57 Wn.2d 162, 356 P.2d 331 (1960) the court considered an increase

in the pension of retired policemen. The court ruled that the payment of the increase was not a gift of public funds. The court said:

Art. VIII, § 7, of the state constitution prohibits gratuities. We held in Bakenhus v. Seattle, 48 Wn. (2d) 695, 296 P. (2d) 536, that a pension granted to a public employee is not a gratuity, but is [[Orig. Op. Page 5]] deferred compensation. That renders Art. VIII, § 7, inapplicable. Here there is a compensation increase which may apply as well to deferred compensation as compensation paid during active service.

57 Wn.2d at 165. See also Marysville v. State, 101 Wn.2d 50, 57-8, 676 P.2d 989 (1984) and Bellevue Sch. Dist. v. Bentley, 38 Wn. App. 152, 159, 684 P.2d 793 (1984), which recognize that payments for services rendered by employees are not prohibited by article 8, section 7.

That employees choose to donate leave instead of taking it, does not change the fact that the leave has been accrued or that the county has received consideration for its payment. Nor does the fact that employees choose to give the leave to the sick leave bank establish donative intent on the part of the county. If an employee elects to donate leave, there is obviously donative intent. But the donative intent is on the part of the employee, not the county. The proposal accompanying your letter plainly states that donation of leave is voluntary. Nothing in article 8, section 7 prohibits an employee from making such a donation. Since payments from the sick leave bank consist of leave donated by the employees who have accrued the leave, there is no gift of public funds. And since there is no donative intent on the part of the county, there is no basis for questioning the adequacy of consideration the county receives for payment of the leave. Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 703, 743 P.2d 793 (1987).

Since there is consideration and no donative intent on the part of the county, we conclude that the proposed sick leave bank does not violate article 8, section 7.

Question 2:

Is leave that is donated to the sick leave bank by a county employee compensation earnable under RCW 41.40.010(8) of the employee donating the leave?

This question relates to the treatment of leave donated to the sick leave bank under the Washington Public Employees' Retirement System (PERS)^{3/}

established in chapter 41.40 RCW. [[Orig. Op. Page 6]] RCW 41.40.410 provides that employees of political subdivisions of the state may become members of the state retirement system by approval of the local legislative authority.

A number of the provisions in PERS turn on the concept of "compensation earnable". A PERS covered employee must make contributions toward retirement benefits based on a percentage of the employee's "total compensation earnable". RCW 41.40.330. Additionally, pension benefits are a function of years of covered service and the employee's "average final compensation," which is defined as average compensation earnable during the appropriate measuring period. RCW

41.40.010(15)(a), (b); RCW 41.40.185, [41.40].188, [41.40].190. "Compensation earnable" includes "salaries or wages earned during a payroll period for personal services." RCW 41.40.010(8)(a), (b).

Your second question asks whether leave accrued by a county employee and donated to the sick leave bank constitutes "compensation earnable" of the donating employee. If donated leave is "compensation earnable" of the employee making the donation, then the donating employee should make contributions to PERS based on the value of the hours, the donating employee may be entitled to include the value of the leave in the employee's pension base, and the donating employee may be entitled to service credit for the period when the leave is accrued, if he or she would otherwise not be entitled to such credit.

In our opinion, accrued leave donated to the sick leave bank is not "compensation earnable" to the donating employee because it does not constitute salary or wages under RCW 41.40.010(8). In AGO 1976 No. 1 we considered the meaning of the phrase "salary and wages." The question was whether the payment of terminal leave or severance pay for vacation or sick leave constituted "compensation earnable" under RCW 41.40.010(8)(a). We concluded that such payments constituted "compensation earnable" and in doing so said:

"The word 'salary' is defined in Webster's Third New International Dictionary (1963 ed.) as:

"a fixed payment at regular intervals for services.'

"Black's Law Dictionary, quoted with approval in Maes v. City of New Orleans, (La.) 97 So. (2d) 856 (1957), defines 'salary' simply as:

"A reward or recompense for services performed.'

....

[[Orig. Op. Page 7]]

This general view of the scope of "salaries and wages" is likewise supported by numerous cases from other jurisdictions. Thus, a sick leave allowance has been held to be encompassed within the term "wages" in Barrett v. California Unemployment Insurance Appeals Board, 12 Cal. Rptr. 356, 190 C.A. 2d 854 (1961) and Temple v. Pennsylvania Department of Highways, 445 Pa. 539, 285 A. 2d 137 (1971). Vacation pay has similarly been held to be encompassed by the term "wages" in Geremia v. Administrator, Unemployment Compensation Act, 146 Conn. 264, 150 A. 2d 203 (1959); Carter v. Board of Review Under Oklahoma Employment Security Act, 323 P. 2d 362 (1958); and Textile Workers Union of America, CIO v. Williams Port Textile Corp., 136 F. Supp. 407 (D.C. Pa. M.D. 1955).

AGO 1976 No. 1 at 9 (quoting AGO 63-64 No. 61 at 5). See also AGO 1982 No. 6 at 3; AGLO 1980 No. 11 at 2-3.

Under these opinions the payment of vacation and sick leave constitutes salary or wages. However, AGO 1976 No. 1 only dealt with the payment of vacation or sick leave. The opinion did not deal with accrued leave that is not paid. AGO 1976 No. 1 at 7 n. 7. Just because leave is accrued does not mean it will be paid. For example, under county ordinance vacation leave in excess of 30 days cannot be transferred from one calendar year to another and must be forfeited. Pierce County Ordinance 3.72.040. Similarly, upon retirement the payment of sick leave is limited to 200 days. Any additional days of sick leave are lost. Pierce County Ordinance 3.68.050.

In our opinion, accrued vacation and sick leave donated to the leave bank do not constitute salary or wages to the donating employee. There is no payment to that employee. Unpaid vacation and sick leave therefore do not meet the definition of salary and wages. Unpaid leave is not a fixed payment at regular intervals for services. The donating employee accrues the leave but is never paid for it. Indeed, under the proposal, the donating employee must relinquish all claim to the donated leave. Since the donating employee receives no payment for the donated leave, we conclude that the leave is not compensation earnable by the donating employee under RCW 41.40.010(8). As a result, the [[Orig. Op. Page 8]] donating employee need not make contributions based on the donated leave, will not receive service credit based on the donated leave, and cannot determine average final compensation based on the donated leave.^{4/}

Question 3:

Is leave paid from the sick leave bank to a county employee compensation earnable under RCW 41.40.010(8) of the employee receiving the leave?

Your third question asks about the retirement impact of the sick leave bank on an employee receiving payments. As previously noted, "compensation earnable" consists of salary and wagesearned by a member. We conclude that payments from the sick leave bank are not "compensation earnable" of the employee receiving them because the employee receiving the payments does not earn the payments.

A payment is earned if it is accredited to one as remuneration for work done or services rendered. See Webster's Third International Dictionary (1966) at 714. Although the employee receiving the leave payments has provided services to the county, the payment of donated sick leave is not made in return for those services. The services are not quid pro quo for the leave payment. Instead, the employee may apply to the sick leave bank and receive payments only in the event of catastrophic illness or injury and only if the employee has exhausted his or her own accrued vacation and sick leave. It is the donating employee, not the recipient, who earned the leave in return for services rendered.

In addition, payments are based solely on donation. They are not earned by the receiving employee. The receiving employee is not entitled to the payments--the receiving employee has no right to payments from the sick leave bank as he or she would have if they were earned for service to the county. The employee must apply to participate in the program. Even if the application is approved, no payments are made if the sick leave bank is empty.

[[Orig. Op. Page 9]]

Since payments from the sick leave bank are not "compensation earnable" of the receiving employee, that employee need not make contributions based on the payments from the bank, will not receive service credit based on the payments from the bank, and cannot determine average final compensation based on payments from the bank.

We trust that the foregoing will be of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY
Attorney General

RICHARD A. MCCARTAN
Assistant Attorney General

WILLIAM B. COLLINS
Assistant Attorney General

Appendix D – Joint Legislative Audit and Review Committee: Leave Sharing Report 97-7

See Attached Report: Leave Sharing Program Report 97-7