PUBLIC EMPLOYEES—Advance Payment of Earned Vacation Pay.

Opinion Requested by Hon. Patrick E. Chavis, Jr. State Senator.

You have informed me that a dispute has arisen between the State of Indiana and some of its employees in the classified state service concerning the payment to employees of earned vacation pay. The employees desire that an employee be paid at the beginning of his vacation period and prior to the date on which the next salary or wage check would ordinarily be paid. You stated that the State of Indiana has adopted the position, on the advice of the State Board of Accounts, that such payments may not be made, and requested my opinion on this matter.

Employees in the classified state service are commonly referred to as "merit employees," and will be so referred to hereafter. Pay periods and pay dates for merit employees are presently established by administrative action rather than by statute. The Auditor of the State of Indiana is designated as the ex officio "director of auditing" by section 4(b) of The Financial Reorganization Act of 1947, chapter 279 of the 1947 Acts, Burns IND. STAT. ANN. § 60-1804(b). The director of auditing is given the duty

"... (3) (a) To examine each and every payroll or salary voucher submitted for payment by each state officer or state agency and shall issue his warrant in payment, payable to the officer or employee or claimant. ... (b) He shall also keep an earnings record for each employee, which record shall show gross com-
pensation, net compensation, items withheld for federal tax, public employees' teachers' retirement or other retirement, and any other deductions now authorized or hereafter authorized to be deducted from earnings. . . .” Act, section 7, as amended by Acts of 1951, ch. 2, § 1, Burns § 60-1807.

The Auditor is forbidden by section 32 of the State Personnel Act, Acts 1941, ch. 139, Burns § 60-1332, to draw a warrant for payment for services of a merit employee without first securing a certification of the Personnel Director of the Indiana Department of Administration. (The Personnel Director of the Indiana Department of Administration has replaced the Director of State Personnel designated in that section of the State Personnel Act. See section 10 of the Administration Act of 1961, chapter 269 of the 1961 Acts, Burns § 60-110.) The certification must show that the persons named on a payroll are established in their positions according to the State Personnel Act, and that payment of the amounts shown will not violate the pay plan or rules adopted pursuant to that Act.

Under section 6(c) (2) of the State Personnel Act, Burns § 60-1306(c) (2), the State Personnel Board has adopted rules concerning the submission of payrolls and time reports to the Personnel Division of the Department of Administration for certification, Rule 4, § 4-3, as last amended August 17, 1967. Subsection (D) of that section indicates that the Auditor of State establishes the policies for payroll procedures for employees in the state service.

State Budget Agency approval of any payment for personal services is also required by the 1967 Appropriations Act, Acts 1967, ch. 298, § 3, at p. 1077.

The Auditor's office has informed me that at the present time, each state employee is paid on the basis of two pay periods per month, ending respectively on the 14th, 15th or 16th (depending upon the length of the month involved) and on the last day of the month. Pay dates are divided into three sets, established as of January 1, 1968, which are the 8th and 23rd of each month, the 11th and 26th, and the 14th and 29th. It appears that both the pay periods and the dates
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of actual payment are established by agreement among the Auditor, the Personnel Division of the Department of Administration and the State Budget Agency. The periods and dates were selected to allow sufficient time for preparation and submission by the agencies and departments making up the payrolls, certification by the Personnel Division, approval by the Budget Agency, and handling in the Auditor's office. The increasing use of computers in the Auditor's office has required adjustment and standardization of pay periods and dates.

Under these present administrative rules and policies, an employee who is paid on the 8th and 23rd of each month, and who desires to begin an eleven day earned vacation leave on the first of a month (to return to work on the 16th), would not receive his check for the pay period ending on the last day of the preceding month until the 8th, the eighth day of his vacation. He would not receive the check for the pay period which includes his vacation until the 23rd, which is after his return from vacation. Apparently some merit employees desire, under those circumstances, to receive, before leaving on vacation, either the check ordinarily payable on the 8th or the check ordinarily payable on the 23rd, or both.

It is my understanding that some officers of the State of Indiana have taken the position that such payments are forbidden by law, based at least in part upon the following language in the 1967 Appropriations Act, Acts 1967, ch. 298, § 1, at p. 979:

“No vouchers for any of the items embraced within the classifications of operating expenses, capital outlay or fixed charges shall be payable in advance. . . .”

The term “operating expenses” is not defined in the 1967 Appropriations Act, but “total operating expense” is defined in section 1, at p. 979, to include “personal service.”

Acts 1863, ch. 36, § 1, Burns § 49-1104, prohibits the drawing or receiving of salaries by public officers “in advance.” Further, section 22 (a) of the Financial Reorganization Act of 1947, Burns § 60-1822) (a), prohibits “payment for any ser-
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... by any state agency... in advance of receipt of such services... by the state.” Therefore, it is apparent that vacation pay may not be paid at the beginning of a vacation period if it is payment for services not yet rendered. (Of course, in the example given supra, payment for the pay period ending on the last day of the month at any time after that date and before the 8th would not be payment “in advance of receipt of... services.”)

The State Personnel Act authorizes the Indiana Personnel Board to make rules and regulations, section 6, Burns § 60-1306. Section 30 of that Act, Burns § 60-1330, requires that such rules shall “contain provisions for annual, sick, and special leaves of absence with or without pay or with reduced pay, and may allow... the accumulation of annual and sick leaves.” Pursuant to that section, the State Personnel Board rules, as last amended August 17, 1967, provide as follows:

“Vacation leave with pay shall be earned by all full-time employees in the classified service at the rate of one working day for each full month of employment. Employees working on a part-time basis shall earn vacation at the rate of one-half working day a month. Vacation will not be credited to hourly, per-diem, temporary, intermittent, contractual, or employees working less than one-half time.” Rule 11, § 11-3(A).

Subsection (F) of section 11-3 reads in part as follows:

“1. Upon separation from the service, in good standing, an employee shall be paid for unused vacation for a maximum of six calendar weeks, plus earned overtime and holiday leave to the extent accumulated... “2. Payment for unused vacation leave, not to exceed six calendar weeks, and all earned overtime and holiday leave shall be paid to beneficiaries of deceased employees.”

Pursuant to Rule 12, § 12-3(E), a dismissed employee forfeits all accrued vacation leave.

In 1943, the Attorney General interpreted a rule similar to Rule 11, § 11-3(A) of the present rules. He stated:
“That rule necessarily became a part of a contract of employment and the rights of the employee vested thereunder.

“In the very few cases arising under state regulations or statutes concerning the right to accrued vacation pay after the termination of employment, the decisions have turned upon a determination whether this earned and accrued leave is compensation or a gratuity.

“In a recent Michigan case—Rainey v. State, 296 N.W. 323 (1941), I believe the proper result was reached. In that case the Legislature, in effect, abolished the position held by the plaintiff who was held entitled to the earned vacation pay upon termination. It is true that Rule 17 of the Civil Service Commission of Michigan expressly provided that upon separation the employee should be entitled to accrued vacation pay. The Court, however, did not rely upon the express provision of Rule 17 as much as it did upon the premise that a ‘vacation with pay is not a gratuity; it is compensation for services rendered.’

“Such, in my opinion, is the proper interpretation of Section 3 of Rule 11. The whole tenor of that rule seems to import that one who renders faithful service thereby earns and is entitled to an additional reward—a right to vacation with pay. Consequently, the right having accrued and vested it cannot, constitutionally, be taken away by the termination of the employment, whatever the means of termination.” 1943 O.A.G. pp. 184, 186.

This opinion was reaffirmed by a succeeding Attorney General in 1949 O.A.G. pp. 127, 130. The present Rule 11, § 11-3 (F), quoted supra, now provides that an employee is entitled to accrued vacation pay upon separation from the service, as did Michigan’s Rule 17.

I agree with the 1943 and 1949 opinions that vacation pay is earned, and that, up to the maximum which may be paid upon termination of the employment relationship, it is a vested right of a merit employee of the State of Indiana, subject
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to the employee's loss of such right upon dismissal. Therefore, payment for such earned vacation prior to the time the vacation days are actually taken would not be payment given "in advance of such services" in violation of the statutes set out above, and is not forbidden by law.

As previously stated, however, the establishment of pay periods and pay dates for merit employees is an administrative duty of the Auditor of State, consulting with the Personnel Division of the Department of Administration and the State Budget Agency. Therefore, the Auditor, consulting with those agencies, may decide the manner or time when earned salary payments, including earned vacation pay, may be made. That time may be in advance of the date ordinarily used, as the selection of a manner or time for payments is merely an accounting procedure.

OFFICIAL OPINION NO. 9

April 13, 1968

PUBLIC EMPLOYEES—Normal Working Day—Apparent Conflict Between Legislative Act and Administrative Rule.

Opinion Requested by Mr. R. F. McElheny, Director, Personnel Division, Department of Administration.

I am in receipt of your request for an opinion concerning a seeming conflict between one of the rules of the State Personnel Board, and Acts 1953, ch. 133.

Rule 11 of the State Personnel Division, as last amended August 17, 1967, in section 11-1 provides:

"The normal minimum working week shall be 40 hours except as otherwise established by statute or by speci-