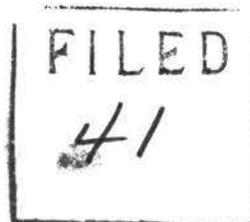


April 30, 1975

OPINION LETTER NO. 41
Answer by letter-Nowotny



Mr. Edward A. Godar, Director
Division of Personnel
117 East Dunklin
Jefferson City, Missouri 65101

Dear Mr. Godar:

This opinion is in response to your question asking:

"Under what circumstances, if any, may food, living quarters, and/or other maintenance benefits be furnished to a state employee free of charge and in addition to the normal salary for such class of employee?

"(a) Is there any constitutional or statutory provision which governs this question for merit system and non-merit state employees alike?

"(b) Rules 6.4(d) and 6.4(e) of the Personnel Advisory Board limit total remuneration to actual salary and require a schedule of charges for subsistence or maintenance. Do these rules properly implement Section 36.140 RSMo? If so, may the Board under these rules provide differential treatment for some classes of employees by exempting institution superintendents from payment of rent and by granting a supplement to normal salary for medical superintendents for whom a free state-owned residence is not furnished?

"(c) Does Section 191.160 RSMo still apply to any agencies of State government as re-organized July 1, 1974? If so, to what specific agencies?

Mr. Edward A. Godar

"(d) Does Section 191.160 RSMo conflict with Section 36.140 RSMo and Rules 6.4(d) and 6.4(e) of the Personnel Advisory Board? If so, which prevails for agencies with merit employees?

(e) If Section 191.160 RSMo still allows the provisions of free room and/or board to some employees, may the Personnel Advisory Board take this into account under Section 36.140 RSMo and provide in the Merit System pay plan a differential in pay range for employees in the same class who receive and who do not receive such benefits?"

In our Opinion No. 62, 1970 to Ulett, we held that the ". . . terminology employed by the legislature [in Section 36.140, RSMo, with respect to the merit system pay plan] leads us to the conclusion that the only compensation permitted merit system employees is that which is set by and within the rates of the particular classifications of the merit system and is limited strictly to monetary compensation. . . ." and that therefore the purchase of liability insurance for the employees' benefit is not authorized. We have reviewed this conclusion and have reached the conclusion that the distinction drawn in that instance and between our Opinion No. 93, 1969 to Cason, was in error. In such opinion to Cason, copy enclosed, this office held that a school board has the authority to purchase liability insurance covering an employee's negligence even though the board enjoyed sovereign immunity and that such purchase of insurance was viewed as additional compensation to the school board employees.

It is our view that the Cason opinion is applicable in this instance and that the appointing authority under the merit system may furnish living quarters, food, and the like to employees as part of their compensation.

Personnel Advisory Board Rules 6.4(d) and (e) provide respectively:

- "(d) Total Remuneration. Any salary rate established for an employee shall represent the total remuneration for the employee, not including reimbursement for official travel and subsistence while away from his official station.
- "(d) Subsistence Allowances. Subsistence or maintenance allowances received in

Mr. Edward A. Godar

lieu of cash shall be considered as part of the total salary. Whenever subsistence is allowed in lieu of cash, a schedule of such charges together with a statement of the policy and rule to be followed in making the charges shall be submitted by the appointing authority to the Director, for the approval of the Board."

It follows that Rule 6.4(d) of the Personnel Advisory Board, which limits "total remuneration" to the salary rate established, standing by itself would not be consistent with the conclusion we have reached except for the fact that Rule 6.4(e) provides that subsistence or maintenance allowances received in lieu of cash shall be considered as part of the total salary.

As we view the Rules taken together, Rule 6.4(e) qualifies the definition of salary in Rule 6.4(d) and therefore both rules are consistent with our views respecting compensation.

Section 36.140, RSMo Supp. 1973, provides in pertinent part:

"1. After consultation with appointing authorities and the state fiscal officers, and after a public hearing, the director shall prepare and recommend to the board a pay plan for all classes subject to this law. The pay plan shall include, for each class of positions, a minimum and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing the rates, the director shall give consideration to the experience in recruiting for positions in the state service, the rates of pay prevailing in the state for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the state. . . ."
(Emphasis added)

In our view, the above-underscored provision recognizes that maintenance or other benefits will be received by some employees and that such must be taken into consideration in establishing the pay plan for the classification when the benefits are furnished the employee as part of his compensation. Thus, such benefits are

Mr. Edward A. Godar

to be taken into consideration by the Personnel Advisory Board in establishing a pay range for employees in the same class who receive and who do not receive such benefits.

The situation is somewhat different, however, with respect to board and living quarters furnished employees when such is furnished as a condition of employment and for the good of the state. Clearly, there are and will be situations where it is necessary for the good of the state and, therefore, essentially a condition of employment that the employees be furnished board and living quarters for the proper performance of his duties. This situation could exist in any department of the state, regardless of whether such department is under the merit system. It is our opinion that under such condition as being for the benefit of the state, that board and living quarters can be so furnished to employees of any department.

In this respect, Section 191.160, RSMo, to which you refer, merely recognizes this principle, reading as follows:

"The department of public health and welfare may provide any employee in any institution under its control with board and living quarters in addition to salary, or wages, when the director shall determine that it is for the best interest of the state to do so."

First, we note that the Department of Public Health and Welfare has been abolished and all the powers, duties, and functions of the Director of the Department of Public Health and Welfare, and particularly the powers in Chapter 191, RSMo, are now in the Department of Social Services except those assigned to the Department of Mental Health. See Section 13.1, C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly. Thus, the provisions of Section 191.160, as it relates to the Division of Mental Health, are now administered by the Director of the Department of Mental Health. See Section 9.3 of Senate Bill No. 1. Therefore, whatever power the Director of the Department of Public Health and Welfare had concerning Section 191.160 that authority and power is now in the Director of the Department of Social Services for that department and in the Director of the Department of Mental Health for that department.

In view of the discussion above concerning providing board and living quarters to state employees as compensation, it is clear from the language used in Section 191.160, that board and living quarters furnished pursuant to said section is different from that which is furnished as a part of compensation to state

Mr. Edward A. Godar

employees. Therefore, when the directors of the Department of Social Services and the Department of Mental Health, as well as the directors of all the other departments, determine that it is for the good of the state and necessary for the proper performance of duties such board and living quarters shall be furnished "free of charge" to the employee. Thus, for example, when persons are required for the benefit of the state to be on a technical 24-hour duty, whether physicians or guards or other personnel, they may be furnished such board and living quarters.

In a situation where the board and living quarters is furnished as a condition of employment, it is our view that such benefits are not "salary." Whether the furnishing of room and board is for the good of the state and constitutes a condition of employment and thus is not salary, or whether it constitutes additional compensation and thus is salary, is to be determined by the directors of the departments.

It is also our view that for merit system departments, where such room and board is furnished as a condition of employment, the benefits are not "received by" the employee within the meaning of Section 36.140 and consequently are not to be considered in the determination of the pay plan for the classification. Similarly, such "benefits" are not, in our view, within the meaning of Personnel Advisory Board Rules 6.4(d) and (e), above quoted, because they are not salary. Finally, we recognize that the situation may exist where an employee is furnished "benefits" which are in part for the good of the state and in part considered "salary" by the department directors. In such a case that part which is considered "salary" should be taken into consideration by the Personnel Advisory Board in computing the pay plan for the classification.

We do not in this opinion purport to rule in any way on the question whether board and/or living quarters furnished as a condition of employment constitute salary, wages, earnings, income, or compensation insofar as income taxes or social security taxes are concerned.

In view of our holding, our Opinion No. 62, 1970 to Ulett, is withdrawn.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 93
9-9-69, Cason