

Opinion No. 53-5785

July 20, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Morris A. Abram Warden New Mexico State Penitentiary Santa Fe, New Mexico

{*188} This is in reply to your letter of June 29, 1953, in which you request an opinion, first on whether the Penitentiary at this time can become a member of the Retirement Association.

In answer to your first question, on September 26, 1951, this office rendered an opinion to Mr. Epigmenio Ramirez, Secretary of the Public Employees Retirement Board holding that under Section 3-1601 and 3-1602, N.M.S.A., 1941 Compilation, all employees of the State Penitentiary automatically became members of the Retirement Association.

I am enclosing a copy of Opinion No. 5433 which to this date has not been reversed or withdrawn.

It is true that this opinion was rendered under the old law but under the new law which is Chapter 162, Laws of 1953, under Definitions the following is found:

"'State' means the State of New Mexico, and includes its boards, departments, bureaus and agencies.

"'Employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer. The term 'employee' shall not include any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the State of New Mexico or any of its political subdivisions."

Section 2, under the heading of Retirement Association and Retirement Board, is found the following:

"(1) The Public Employees' Retirement Association of New Mexico established by Chapter 167, Laws of 1947, as amended by Chapter 174, Laws of 1949, and since maintained and now existing pursuant to said Act, is hereby designated and continued as the Association for the purpose of this Act, including except as otherwise expressly provided herein, the continuing of existing membership, rights, service credits, funds, powers and obligations."

It appears that the term "beneficiary" in sub-section 1.7 of Chapter 162, New Mexico Session Laws, 1953, requires interpretation and a legal definition given to the term "beneficiary". Page 325, Vol. 5 of Words and Phrases defines "beneficiary" as follows:

"A recipient of another's bounty or one who receives benefit or advantage."

{*189} In the case of Benedict vs. La Guardia on page 389, Vol. 3 of New York Supplement, "beneficiary" is defined, "as one who ceased to be a member and became a beneficiary of the retirement system".

It is therefore the opinion of this office that under the previous opinion of the old law, that membership in the association shall be optional on the part of present employer, namely, those who were in the employ of the State on August 1, 1947, and all new employees since August 1, 1947 automatically became members of the Association by acceptance of employment with the State.

As to your second question, whether or not the Penitentiary would legally bear a part of the burden that would be imposed on the employees in paying the arrears since the law became effective on August 1, 1947; it is the opinion of this office that this law is mandatory and that all new employees since August 1, 1947, are members of the Retirement Association as employees of the State Penitentiary, and all old employees who did not exempt themselves on or before August 1, 1947 as provided by law. The Penitentiary can legally bear the burden imposed on it in paying the arrears in matching contributions since the law became effective. The Penitentiary will be responsible for the monthly deductions which the Penitentiary neglected or refused to pay, namely the 3 1/2% under the old law and the 5% under the new law.

By: Hilario Rubio

Assist. Attorney General