

Opinion No. 57-178

July 23, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
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TO: John C. Hayes, Administrator, Social Security Division Public Employees
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QUESTIONS

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If teachers come under the Social Security Program, would the annuity payable to emeritus employees under § 31, Chapter 197, Laws of 1957, be considered wages and would such annuity be subject to Social Security contributions?

CONCLUSION

No.

OPINION

ANALYSIS

A large number of people retired under the provisions of § 73-12-16, N.M.S.A., 1953 Compilation, and in the act were exempt from the provisions of all other state retirement acts. Subsection (d) of the above section provided that such retirement employees were to be retained in an emeritus employment status and that it was possible for the State Educational Retirement Board to require them to perform such services as they may have been physically qualified to perform upon demand by the Board. Although this statute was repealed by Chapter 197, New Mexico Session Laws of 1957, the law contains a savings clause which states that all persons who heretofore had been retired under the provisions of § 73-12-16 shall be deemed to have retired under the Educational Retirement Act set up in Chapter 197 and shall continue to receive retirement benefits in the same amount which they were heretofore receiving. The above section of Chapter 197 also states that such person possessing emeritus status may be required by the Board to perform any services they are physically qualified to perform.

The question which arises from the facts summarized above is whether the superannuated employees, who are now drawing an annuity pursuant to § 31 of Chapter 197, New Mexico Session Laws of 1957, are receiving wages or whether they are receiving retirement payments.

It is our opinion that the employees mentioned above are receiving benefits from a "retirement system" rather than wages. Section 31 of Chapter 197 refers to retirement benefits -- saving clause -- emeritus status. It goes on to state "all persons who have heretofore **been retired** under the provisions of Section 73-12-16, upon the basis of service and age, shall be deemed to have retired under the Educational Retirement Act etc."

By way of conclusion, in State ex rel. Public Employees Retirement Board v. Mechem, Governor, et al., 58 N.M. 495, 273 P. 2d 361, the Court, in discussing the Public Employees Retirement Act which then existed by virtue of § 73-12-16, stated both acts provided for different types of retirement programs. Under § 209 of the Social Security Act, 42 U.S.C.A. 409, it is clear that the "retirement" payments received by a retired individual are to be excluded from wages. We have no doubt that moneys received by superannuated employees are retirement benefits as differentiated from wages, and hence the annuity received should not be subject to Social Security contributions.