

Opinion No. 57-176

July 22, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Floyd Santistevan, Director, Educational Retirement Board, State of New Mexico, Santa Fe, New Mexico

QUESTIONS

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1. Are the retired educational employees entitled to retirement benefits after they have been recalled into active service?
2. When a person in an emeritus employment status accepts employment with a public school board of education other than the board by which he was employed at the time he was placed in such status, can then the Educational Retirement Board withhold permanently the retirement benefits such person would have been entitled to had he not accepted such employment?

CONCLUSIONS

1. No.
2. Yes, so long as the employment continues.

OPINION

ANALYSIS

We assume that no question as to disability benefits is involved, but only the above two questions as to retirement benefits.

You have stated in your letter that our opinion on these two questions is needed by you to clarify the meaning of § 73-12-16, N.M.S.A., 1953 Comp. We do not believe that you actually mean this, inasmuch as said Section was one of the provisions repealed by Laws 1957, Chapter 197, Section 60, the latter being a portion of the new Educational Retirement Act. See § 73-12-34 et seq., N.M.S.A., 1953 Comp., 1957 Supplement.

Proceeding to an analysis of question 1, we find that Opinion of the Attorney General No. 57-85 held under the **old law** that retired educational personnel, recalled to active duty, were entitled to retirement benefits as well as salary by way of compensation, and that such double payment was not illegal, citing a prior opinion of the Attorney General.

Such two mentioned opinions were submitted under the law then in effect (and quite properly so), but we find them of little help in determining your present inquiry, which must be determined under the new Educational Retirement Act which became effective July 1, 1957.

Turning to the provisions of the new law, § 73-12-67, N.M.S.A., 1953 Comp., 1957 Supplement, reads as follows:

"Members who are eligible for retirement may continue in employment and contribution shall continue to be paid as herein provided.

"No member shall be on retirement status while he is engaged in employment as defined herein.

"A member who has fifteen or more years of earned service-credit may, if he chooses, terminate his employment and retire at any time after he reaches the age of sixty (60) years, if he leaves his contributions in the fund." (Emphasis ours.)

We hold that the emphasized portion of this Section clearly prohibits the double payment which was perfectly permissible, and to which the members were entitled, under the old law. In so holding, it is not necessary to overrule the two prior opinions above mentioned inasmuch as they were submitted under different statutes. While employees who retired under the prior law have saved unto them their retirement benefits, see § 73-12-63 and 64, N.M.S.A., 1953 Comp., 1957 Supplement, § 64 provides that said employees

". . . shall be deemed to have retired under the educational retirement act . . ."

(meaning the new law). Reading § 67 and § 64 together, it is clear that retired educational employees who are recalled to active duty may not be paid retirement benefits while engaged in employment.

The answer to your first question is that the double payment can not legally be done, and the answer to your second question is, of course, that the benefits may be withheld so long as the employment continues.