Opinion No. 57-300

November 20, 1957

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

TO: The Board of Regents, New Mexico Military Institute, Roswell, New Mexico

QUESTION

QUESTIONS

1. What is the maximum amount of money that the Institute and the employees, respectively, can be required to contribute under the New Mexico Military Institute retirement plan?

2. Are the obligations for the payment of benefits under the Institute plan a general or a special obligation of the Institute?

3. If such obligation is a general obligation, can an employee, or a group of employees, bring an action against the Institute for the purpose of enforcing the same?

4. Assuming that an employee elects to place himself under Chapter 197, Laws of 1957, being the E.R.A., can the Institute refund to such employee the accumulated contributions made by such person to the retirement plan?

5. If such contributions made by such employee may be refunded to him, can the Institute pay interest upon such accumulated contributions, and if so, from what source or fund?

6. If the obligation of the Institute under such retirement plan is a special obligation to the employees, and the retirement funds accumulated are insufficient to pay the amounts due and owing, can the Institute prorate the funds available among the employees eligible therefor?

7. Can the Institute make a retroactive assessment as against the employees covered by such plan of an amount sufficient to cause a total assessment against such employees since the inception of the plan to amount to a total not in excess of 5 per cent?

CONCLUSIONS

1. 5% from the Institute and the employees, respectively.

2. A special obligation.

3. An answer is not necessary.

4. Yes.

5. Yes, but only from the retirement fund.

6. Yes.

7. Yes, but only against employees not then eligible to retire.

OPINION

ANALYSIS

In answer to your first question the provisions of Section 73-12-26, N.M.S.A., 1953 Compilation, which reads:

"The regents or other governing body of said institutions not participating in the retirement plan are hereby permitted to set up or continue under such rules and regulations as they shall determine a contributory retirement fund or plan, **and cause each member of the faculty or employee** of said institution to contribute, from his monthly salary, to such fund or plan **such an amount, not exceeding five per cent (5%) of such monthly salary, as in the judgment of the regents or governing body shall be adequate, when matched by an equal amount contributed by the institution, to assure the successful operation of such plan,** and the regents or governing body of such institution shall have the right to contract or continue existing contracts with any responsible insurance company authorized to do business in the state of New Mexico for the purchase of annuities for members of the faculty or employees of such institutions" (Emphasis ours.)

clearly give the Board discretion in fixing the contribution percentage **but not exceeding 5%.** Hence, the maximum amount that the Institute and employees, respectively, can contribute is 5% of the individual's gross salary.

Turning to your second question, we find it more difficult of solution. It might well be contended that the language of Section 73-12-26, supra, lends credence to the view that the Institute's obligations are special, i.e., limited to the retirement fund. But we need not stop there, for a clearer answer is obtained from Section 73-12-30, N.M.S.A., 1953 Compilation, which provides:

"Nothing herein contained shall be construed to affect, modify or annul contracts entered into pursuant to such institution's retirement plan heretofore made a part of said contracts and now in force between such institution and its emeritus employees, teachers and regular full time employees, but when any teacher or regular full time employees now in the employment of such institution shall retire with pay in excess of that provided by the statutes of New Mexico, **such institution shall pay the difference**

between the amount which said teacher or regular full time employee may be entitled to receive under the retirement plan heretofore adopted by such institution and made a part of teachers and regular full time employees' contracts, and the amount provided by a statutes in the State Retirement Law. **Said difference may, by such institution, be paid from such funds as may have been mutually contributed by any such teacher or regular full time employee, and said institution in compliance with the provisions of said retirement plan of such institution or from such other funds as the board of regents may prescribe.** Provided, however, that the retirement pay of any teacher or regular full time employee heretofore engaged and now employed by such institution under its said retirement plan, shall be no less, nor more, than that provided in said retirement plan established by such institution prior to the passage of this act. Provided, further, that whereas, the retirement plan established by such institution prior to the passage of this act and agreed to by the teachers, regular full time employees and emeritus employees and such institution has made provision for retirement at 50 years of age, **then any obligation of such institution arising by reason of said plan prior to the time said teacher or regular full time employee reaches the age of 60 years, shall be an obligation solely of such institution and satisfied from funds accumulated through the mutual contributions of such institution and such teachers and regular full time employees, or from such funds as such institution may otherwise provide;** but nothing herein shall prevent any said teacher, or regular full time employee of such institution from receiving the benefits provided in the state retirement plan when he shall have, on account of age and service, become eligible therefor." (Emphasis ours.)

From the language emphasized by us, it appears certain the Institute's obligations are only to be met out of the retirement fund. While under the emphasized part of the statute, the Board might have provided other funds for retirement purposes, conferences between the undersigned, the Board, and its attorney reveal such has not been done. In Board of Trustees vs. Farrar, 236 S.W. 2d 663 (Tex. Civ. App.), aff'd. 243 S.W. 2d. 688 there was indication to the effect that teacher retirement benefits were not to be paid out of any fund except the particular fund designated for that purpose, under provisions less certain than those in Section 73-12-30, supra, insofar as this issue is concerned.

While the question is not entirely free of all doubt, we are of the opinion the Institute's obligations are special and limited to the retirement fund. It is thus not necessary to answer your third question.

The answer to the fourth question is in the affirmative. Section 73-12-26, supra, authorized the Board to set up a retirement plan. We held in Opinion of the Attorney General No. 57-216 that benefits could not be paid under both the Educational Retirement Act, being Laws 1957, Chapter 197, and the Institute plan. If then, an employee goes under E.R.A., he can't claim retirement benefits under the Institute plan. But does such course cause the employee to lose all right to contributions previously made by him into the New Mexico Military Institute retirement fund? We do not think so. There is an absence of language in the statutes so indicating. To hold that the

employee loses his contributions under the circumstances present, is to imply a forfeiture of those contributions. Since they are not favored, Hargrove v. Lucas, 56 N.M. 323, 243 P. 2d. 623, we refuse to so hold.

By answering your fourth question in the affirmative we have thus acknowledged that the employees have certain rights in the fund, or rather, that their contributions are not to be forfeited if they go under the Educational Retirement Act. It accordingly follows, under general rules of law, that interest which has accrued to the fund will follow the principal and will (in event of refund) be paid to the refund applicants, on a pro rata basis. In keeping with our answer to your second question however, interest on refunded contributions could only be paid from the retirement fund, as above set forth.

Your sixth question assumes that the retirement fund is, or will be, insufficient to discharge the obligation to the employees. You ask if that event should transpire, can the Institute prorate the funds then available. Since the obligation of the Institute is special, no other course would seem to be open. It is all that could be done, since any other conclusion could lend to grossly inequitable results. However, preference would have to be given to discharging the funds obligation to those employees whose rights had become vested.

In answering your seventh question, we assume no retroactive assessment would be attempted, as to a particular employee, beyond the date of his initial employment. Since Section 73-12-26, supra, authorizes the Board to require up to 5% contributions from the employees as will, in the Board's judgment, insure a successful plan, it follows that much discretion is imposed in the Board. Note also the Board's power of adopting rules and regulations in this respect. In other words, considerable leeway is given the Board to the end a sound plan will be achieved. Obviously, the Legislature, in enacting Section 73-12-26 contemplated a fluctuating or varying rate of contributions, not exceeding 5%. Doubtless at least one reason for this was to allow for mobility under changing conditions or as new needs arise. But such construction of Section 73-12-26 must not be extended so far as to run afoul of certain constitutional provisions. For example, it was held in McBride vs. Retirement Board, 330 Pa. 402, 199 A. 130, that while the board could adopt changes in payments, or adopt other actuarial changes to protect the principal or better the security of the retirement fund, it could not take such action against employees whose rights had become vested, i.e., after the employees had met all conditions precedent to retirement. Otherwise, there would be an impairment of contract in violation of the contract clause of the Constitution of the United States. While we hold the retroactive assessment may be made against those employees whose rights are yet inchoate, we further hold such can't be done as to those employees whose rights have become vested

We have examined Section 73-12-20, N.M.S.A., 1953 Compilation, as requested, but find it has no effect on Opinion of the Attorney General No. 57-272.