

## **Opinion No. 57-61**

March 26, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

**TO:** Mr. Frederic G. Comstock, State Budget Director, State of New Mexico, Santa Fe, New Mexico

### **QUESTIONS**

#### QUESTIONS

Does Article IV, Section 27 of the New Mexico Constitution prohibit the modification of the Federal-State Agreement providing for Social Security coverage for State employees with effective date which is retroactive to July 1, 1956?

#### ANSWER

No.

### **OPINION**

#### ANALYSIS

Article IV, Section 27 of our State Constitution reads as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; . . ."

In order to bring the question into proper focus it will be necessary to relate the facts. At a properly called referendum held in December, 1956, the State employees under the Public Employees' Retirement System elected to accept coverage under the Social Security System. This election authorized a modification of the existing Federal-State Agreement to include these State employees. In December, 1956, this modification was made and the effective date of the modification was made July 1, 1956.

The inquiry requires a determination of whether the share which the State will be required to pay the Federal government for this retroactive coverage amounts to extra compensation to each State employee after the "services are rendered or contract made."

It will also be necessary to determine the actual effect of Chapter 172, Laws 1955, so far as this problem is concerned. This law is the enabling legislation by which New Mexico may provide public employees of the State the benefits of the Federal Social

Security System as provided by Section 218 of the Social Security Act. So far as the state employees are concerned, the machinery was set up by this law which allowed such employees as a group to vote on the acceptance of the benefits of the Federal Social Security System.

It thus appears that what in effect the Legislature did by the passage of Chapter 172, Laws of 1955, was make an offer to all State employees covered by State Retirement System, which are the employees covered by this question, that if they elected to come within the provisions of Social Security, the State would provide for the share required by the Social Security Act from the employer.

Section 3 (3) reading as follows:

"(3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein but in no event may it be effective with respect to any such services performed prior to the first day of the calendar year in which such agreement is entered into or in which the modification of the agreement making it applicable to such services, is entered into except that an agreement or modification entered into after December 31, 1954, and prior to January 1, 1958, may be effective with respect to services performed after December 31, 1954, or after a later date specified in such agreement or modification."

provides for the effective dates of the agreement or any modification thereof. This section provided that such agreement could be made retroactive to January 1, 1955, as provided by Section 218 (f) of the Social Security Act. In other words the State has offered to make a contract in the nature of a third party beneficiary contract with the Federal government and put up part of the consideration for the possibility of benefits to the State employees under this system. In order to complete the contract the State employees had to vote the authority to the State in the referendum.

We believe that the State and employees can contract for such benefits within the reasoning of **State ex rel Hudgins et al., vs Public Employees' Retirement Board**, 58 N.M. 543, 273 P. 2d 743. It is to be noted that this case allowed the increase benefits because of the election to come within the provisions of the law by making the contribution. Under this question before us, the employees by voting to come within the provisions of this law agreed to make retroactive contributions as in the **Hudgins** case. We think the statement in the case of **Raines vs. Board of Trustees of Ill. State Teachers' Pension Fund**, 365, Ill. 610, 7 N.E. 2d 489, as follows:

". . . The consideration is the offer of the sovereign, the acceptance of the offer, and performance of its terms. It is a familiar principle that the Legislature possesses all powers not prohibited by the limitations of the Constitution. Among such powers is the power to contract, where the contract is not within any constitutional inhibition or against public policy. The right of the State to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged and has been repeatedly upheld. . . ." sets forth the rule.

Certainly, if such contract can be for increased benefits from an existing retirement plan, there is no reason why the contract cannot provide for prospective additional benefits for State employees who voted in this referendum under the Social Security System.

This opinion does not in any way conflict with the recent opinion from this office, dated February 17, 1957, and numbered 57-17. This opinion holds that the Legislature could not grant a retroactive pay increase to State employees because of Article IV, Section 27 of the Constitution. In the case of a retroactive pay increase it is clearly a unilateral act on the part of the State. In the case now before us, it is a question of the right of the State and the employees to contract for benefits for such employees and as pointed out in the **Raines** case, supra, this was not prohibited by such constitutional provision.

It is our opinion therefore that because Chapter 172, Laws of 1955, provides a means for a contract between the State and Federal government for the benefit of the employees of the State for which contract adequate consideration is given by the State and employees voluntarily, such agreement is not in violation of Article IV, Section 27 of the Constitution, because it is made retroactive to July 1, 1956. The consideration to the State for its contributions is the Federal Agreement to accept these public employees as a part of the Social Security System.