

Opinion No. 58-201

September 30, 1958

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

TO: Honorable Dan Sosa, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

QUESTION

QUESTIONS

"(1) May a teacher retired under the previous act and occupying emeritus status under such former act but returned to active employment after the effective date of the 1957 Act in any way become eligible, by contribution, 'buying in,' earned credit service, or otherwise, to participate, after being returned to retirement status, to the increased benefits of the 1957 Act?

(2) Does the fact that upon return to active employment deductions or contributions were made from the teacher's pay establish any rights towards participation for benefits under the new Act? If not, would she not be entitled to refund of such contributions? And further would there be any advantage or necessity for the continued contributions thereunder?

(3) Would the signing of a waiver agreement by such teacher providing that upon the conclusion of the re-employment period specified such teacher shall be reinstated to prior retirement status with the same benefits the individual was receiving prior to such re-employment effect any exemption or waiver to such benefits that might otherwise have been received under the new act?

(4) If so, does the school system, local or State Educational Retirement Board have the authority to condition any return to active employment from emeritus status on the execution of a waiver to any benefits under the 1957 Act?"

CONCLUSIONS

1. No.
2. No, but the Legislature could enact a refund statute.
3. No.
4. See Opinion.

OPINION

ANALYSIS

Under § 73-12-64 (p.s.), a retired teacher may be recalled to active service, but cannot be considered on retirement status while so engaged. § 73-12-67 (p.s.) But we do not believe these emeritus employees are entitled, by contributions or any other means, to acquire increased retirement benefits by virtue of the Educational Retirement Act when recalled into active service. Indeed, § 73-12-64 (p.s.) provides:

"All persons who have heretofore been retired under the provisions of sections 73-12-16 through 73-12-24, 73-12-27 through 73-12-29, 73-12-31 and 73-12-32 New Mexico Statutes Annotated, 1953 Compilation, upon the basis of service and age, shall be deemed to have retired under the Educational Retirement Act **and shall continue to receive retirement benefit in the same amount which they were heretofore receiving.**" (Emphasis supplied.)

We think this language, particularly that emphasized by us, negates any other implication. Conversely, there is no purpose in contributions when an emeritus employee is recalled.

In regard to your second question, which also involves the case of a retired teacher, recalled to active service, we believe it is disposed of by **State ex rel Bernal v. Foraker**, 64 N.M. 71, 323 P. 2d 1107, the Court saying at 1108:

"There remains a further question as it concerns relator Sanchez. He makes the contention that he is now entitled to qualify for benefits under the terms of Chapter 197, Laws of 1957, which apparently grants more liberal retirement benefits. The contention can not be sustained. Section 73-12-64, N.M.S.A., 1953 Comp., is retained as a part of the 1957 act. The section provides:

'All persons who have heretofore been retired under the provisions of sections 73-12-16 through 73-12-19, 73-12-24, 73-12-27 through 73-12-29, 73-12-31 and 73-12-32 New Mexico Statutes Annotated, 1953 Compilation, upon the basis of service and age, shall be deemed to have retired under the Educational Retirement Act and shall continue to receive retirement benefits in the same amount which they were heretofore receiving.'

It follows that our writs were improvidently issued. and should be set aside."

In short, qualifying under the Educational Retirement Act was denied; hence no deductions or contributions withheld from the teacher's pay, under these present circumstances, would be legal. If now continued they should cease. Such contributions cannot create new rights under the Educational Retirement Act. You have asked about the legality of refunds of these contributions. Refunds or withdrawals are allowed under § 73-12-53 (p.s.), and see also § 73-12-50 (p.s), but the instances therein set forth are not the instant situation. We know of no statute authorizing refunds in a case like the

present one, and consistent with our repeated holdings, decline to approve the same. However, we hasten to add that the Legislature could enact a refund statute covering cases of this nature.

The effect of the waiver, involved in your third question would not serve to grant additional rights under the more liberal Educational Retirement Act. **State ex rel Bernal v. Foraker**, supra. On this the law is explicit. Not having been entitled to the increased benefits, the waiver would have no effect thereon, pro or con,

Since your fourth question is conditioned on an affirmative answer to the third, it appears no answer is necessary.