

**Opinion No. 58-220**

October 31, 1958

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

**TO:** Honorable Georgia L. Lusk, Superintendent of Public Instruction, Santa Fe, New Mexico

**QUESTION**

QUESTION

Does Sec. 73-12-62 (P.S.), fix the formula for determining retirement benefits under the Educational Retirement Act?

CONCLUSION

No.

**OPINION**

ANALYSIS

This problem arises over a divergence of views as to the office of Sec. 73-12-62 (P.S.). We believe the section is immaterial in determining the formula for fixing retirement benefits.

Sec. 73-12-60 (P.S.) provides:

"Retirement benefits shall be be paid monthly and shall be one-twelfth of a sum equal to one and one-half per cent of the first fourth thousand dollars (\$ 4,000) of the member's average annual salary and one per cent (1%) of the remainder of the member's average annual salary multiplied by the number of years of the member's total service-credit."

This, in our opinion, sets forth the formula for determining the amount of retirement benefits.

In turn, Sec. 73-12-61 (P.S.) defines ". . . average annual salary . . ." as follows:

"The member's average annual salary shall be computed upon the last five (5) years for which contribution has been made."

The section in controversy 73-12-62 (P.S.), provides:

"A member desiring to retire before he has completed five (5) years of contributory employment hereunder may, if he chooses, acquire five (5) or less years of contributory employment by contributing to the fund for each year of contributory employment desired a sum equal to the prevailing combined percentage of contributions of members and local administrative units applied to the member's salary at the time contribution for employment as provided in this section is made, with an additional sum as regular interest from the effective date of the Educational Retirement Act as fixed by the board, but not to exceed three per cent (3%).

We think this section contemplates purchase by a member of contributory employment by making a contribution as the section directs. True, the amount of the monetary contribution is based upon the member's salary at the time of contribution. However, this is in no sense tantamount to making the amount of the member's salary, at the time of said contribution, a controlling factor in fixing the amount of the retirement benefits. Insofar as the latter is concerned, Secs. 73-12-60 and 61 (P.S.) govern. We cannot detect any legislative intent that 73-12-62 (P.S.) was to serve in computing the amount of retirement benefits. Retirement benefits must be based upon the last five years for which contributions have been made, Sec. 73-12-61 (P.S.), in accordance with the formula fixed by Sec. 73-12-60 (P.S.). This, however, would necessarily require that the current salary be taken into consideration in computing the five-year average.