

Opinion No. 59-101

August 13, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Oliver E. Payne Attorney Oil Conservation Commission P. O. Box 871 Santa Fe, New Mexico

{*159} Receipt is acknowledged of your letter of recent date in which you request an opinion on the following question:

Mr. George Graham, who was concurrently employed as attorney for the New Mexico State Land Office and the Oil Conservation Commission, paid his deductions and matching contributions as an employee of the Land Office but did not as an employee for the Oil Conservation Commission. Is the Oil Conservation Commission legally bound to pay the matching contributions for Mr. Graham during the period from August 1, 1947 to January 15, 1953 on \$ 19,200.00 paid to him as salary by the Oil Conservation Commission?

It is our opinion that Mr. George Graham is legally obligated to pay contributions as an employee of the Oil Conservation Commission and the Oil Conservation Commission is legally bound under the Public Employees' Retirement Act to pay the matching contributions even though his employment was concurrent and matching funds and contributions were deducted as an employee of the Land Office.

It appears from your memorandum attached to your request for an opinion that Mr. George A. Graham was employed concurrently by the State Land Office and the Oil Conservation Commission during the period from August 1, 1947 to January 15, 1953. The Land Office paid all matching contributions and deducted from his salary contributions for the period involved. However, the Oil Conservation Commission failed to deduct his contributions as an employee of said Commission or to match his contributions on \$ 19,200.00 paid him during said period. Mr. Graham could not, under the retirement law choose while being employed concurrently by the Land Office and the Oil Conservation Commission to be a member of one agency and not participate and contribute from his employment as attorney for the Oil Conservation Commission.

Mr. Graham had the right to exempt himself from both agencies as a member of the Retirement Association {*160} and if he did not exempt himself he was legally obligated to pay all contributions from his salary in both agencies for the period involved. Therefore, the Oil Conservation Commission is obligated to pay \$ 672.00 in matching funds for Mr. Graham for the amount of \$ 19,200 for the period from August 1, 1947 to January 15, 1953.

Subsections 1 and 2 of Section 5-5-6, N.M.S.A., 1953 Compilation, read as follows:

"1. Except as provided in section 6.2 [subsection 2], all employees of an affiliated public employer shall become members of the association beginning with the date their public employer became an affiliated public employer. Any elected official of an affiliated public employer shall become a member of the association upon his written application filed with the retirement board."

"2. Any employee of an affiliated public employer at the time of affiliation of such public employer with the retirement association may exempt himself from membership in the association by filing with his city treasurer, county treasurer or department head, as the case may be, a written application for exemption, and a copy of the same being filed with the retirement board within 90 days from date of such affiliation. The retirement board may exempt from membership employees in occupational classification of a part-time, temporary, seasonal or casual nature."

The pertinent part of Section 5-5-9, N.M.S.A., 1953 Compilation, reads as follows:

"Beginning on the first day of the first month following the effective date of this act, every member, except state police members, shall pay into the employees' savings fund 5 per cent of his regular salary; every state police member shall pay into the employees' savings fund 7 per cent of his regular salary. Prior to the aforesaid first day each said member shall pay into the employees' savings fund 3 1/2 per cent of his regular salary. Such payments shall be made by deductions thereof from the salaries of members."

The last paragraph of paragraph 1, Section 5-5-10, N.M.S.A., 1953 Compilation, also provides as follows:

"The said contributions shall be paid monthly by the affiliated public employers into the employers' accumulation fund as consideration for the retirement coverage of their employees under this act [5-5-1 to 5-5-23] and the estimated amount required therefor shall be included in each annual budget of each said affiliated public employer."

In view of the clear and unambiguous language of the above quoted sections of the Public Employees' Retirement Act of 1953, it is our conclusion and opinion that since Mr. Graham did not exempt himself as an employee from either the Land Office or the Oil Conservation Commission he must pay contributions for all his salary earned from his concurrent employment with the Land Office and the Oil Conservation Commission and the Oil Conservation Commission is obligated to match his contributions for salary paid him during the period from August 1, 1947 to January 15, 1953, as an employee of the Oil Conservation Commission who is a public employer under the Public Employees' Retirement Act.

By Hilario Rubio

Assistant Attorney General