

Opinion No. 59-116

August 20, 1959

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

TO: Mr. Charles L. Craven Assistant District Attorney First Judicial District Aztec, New Mexico

{*180} This is in response to your recent request for an opinion on the following questions:

1. Can employees of San Juan County, which county became an affiliated public employer in 1955, who were employed by the county from 1947 to 1955 obtain full credit for those years (1947-1955) by paying the comparable deduction plus interest together with the total sum of matching contributions?
2. Do the back payments, where they are found to be permitted under the act, have to be made in a lump sum or may the payments be made in installments?
3. Can a person now employed by an affiliated public employer obtain credit for retirement during the years 1947-1950 when that person was serving in the State Legislature?

The answers to your questions are as follows:

1. No.
2. Back payments may be accepted in lump sums or in installments, according to the agreement between the Public Employees' Retirement Board and the person seeking to make the payment for additional service.
3. Yes.

Section 5-5-6, Subsection 3, N.M.S.A., 1953 Comp. PS. (being the codification of Chapter 371, Laws of 1959), provides the basis by which an exempt person may be returned to membership. A very careful reading of Section 5-5-6 discloses that a person, in order to be "an exempt employee" under that section, must have been employed by an **affiliated public employer**.

Those persons who were employed by San Juan County from 1947 to 1955 were not in the service of an affiliated public employer. They could not qualify under the above section.

Those employees, however, who elected in 1955, when the County became affiliated, not to participate, would at this time make back payments and obtain credit for

retirement back to 1955. This is the purpose of Section 5-5-6 referred to above. It is not the purpose of this section, nor can the language be construed, to allow the employees of a non-affiliated public employer to obtain credit for that period of service for a public employer {*181} when that employer affirmatively chose not to participate in the retirement program.

It is possible that some employees who are now working for the county of San Juan were employed during 1947 to 1955, or any part thereof, for another employer who was an affiliated public employer by who, at that time, individually exempted themselves from the operation of the Act. Those employees could now make their back payments and be entitled to credit for the period of time spent in the employ of the affiliated public employer between those dates.

Your second question is also answered by Section 5-5-6, Sub-section 3, N.M.S.A., 1953 Comp. PS. It is provided that the person who qualifies to make back payments may "**enter into an agreement with the retirement board** to pay into the association" (Emphasis supplied) either his share of the contributions for the period sought to be credited plus interest or, his share plus interest **and** the share which would have been contributed by the employer in the event the employer will not pay this amount. The quoted and underlined portion of the section above clearly provides the Retirement Board with the power to accept installment payments if the Board deems it desirable. The Board may also require a lump sum payment. It is within the discretion of the Board to establish a method by which back payments shall be made.

In answer to your third question, the legislator would be entitled to make his back payments and obtain credit for the service rendered between the years 1947-1950. The Legislature was, during the years, considered an affiliated public employer. Chapter 167, Laws of 1947, as amended by Chapter 174, Laws of 1949, established optional membership for state elected officers. The individual legislator could exempt himself from the Association by refusing to act affirmatively. It is immaterial whether a person became exempt by virtue of an affirmative act or through a failure to act. The prime question is whether or not the person, as opposed to the public employer, exempted himself from the Association. If the public employer, by resolution of the governing body, exempted itself from the Act, then the individual had no capacity to accept or exempt himself. It was only where the public employer was affiliated that this right exists. Since the Legislature provided means by which each individual legislator could exempt himself from membership, it is patent that each legislator was regarded as being an employee of an affiliated public employer. As such, he would be entitled to pay his back contributions and obtain credit for service.

The above answer is specifically limited, in the case of the legislator to the years about which the inquiry is directed. We expressly do not answer this question for any years other than those between 1947 and 1950.

By: B. J. BAGGETT,

Assistant Attorney General