

## Opinion No. 59-174

October 28, 1959

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

**TO:** Mr. John C. Hays Executive Secretary Public Employees Retirement Association P. O. Box 2237 Santa Fe, New Mexico

{\*267} This is in response to your recent inquiry in which you asked for our opinion in regard to the following question:

May Mr. R. H. Grissom, presently Chief of the Public School Finance Division, who retired from the then teachers' retirement system on January 1, 1951, waive the retirement benefits under the teachers' retirement system and become a member of the public employees retirement system, entitled to receive the benefits derived therefrom {\*268} upon retirement from that system?

Our answer to your question is that Mr. Grissom cannot waive the benefits of the teachers' retirement and come under the provisions of the Public Employees Retirement system.

Under the provisions of Sections 5-5-5 and 5-5-6.1, N.M.S.A., 1953 Comp., (P.S.), all employees of a public employer (including the State of New Mexico) unless otherwise exempt, must become a member of the Public Employees Retirement Association, coming under the Public Employees Retirement system. The term "employee" is defined by Section 5-5-1G as follows:

5-5-1G "Employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer . . . **'Employee' does not include any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions.**"

(Emphasis supplied)

Therefore, if Mr. Grissom is to be considered as a "beneficiary of any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions" he is not an employee in the context of the statute and cannot become a member of the Association and receive the benefits accruing therefrom. The question is, therefore, whether Mr. Grissom is to be considered as such a beneficiary, and if so, whether he may waive the retirement benefits to which he is entitled and come out from under his position as such beneficiary.

It is our opinion that Mr. Grissom is now a beneficiary of a State retirement plan, and as such, cannot become a member of the Public Employees Retirement Association. Mr. Grissom retired January 1, 1951 under the provisions of the then existing teachers'

retirement system. This system operated under the provisions of Sections 73 - 16 - 12 through 73-16-19, N.M.S.A., 1953 Comp. Under this retirement system, Mr. Grissom was retired in an emeritus status, meaning briefly that he was not actively employed and drew retirement benefits, but was subject to recall for the purposes of employment. Even though Mr. Grissom is in an emeritus status, he must be considered as a beneficiary of another State retirement plan.

The further question arises as to whether Mr. Grissom may legally waive the benefits he is presently entitled to under the teachers' retirement system and therefore not be a beneficiary in the context of Section 5-5-1G. We have carefully searched the provisions of the teachers' retirement act as set out in Sections 73-16-12 through 73-16-16, and can find no authority for such a waiver. Therefore, our opinion is that Mr. Grissom cannot waive the benefits he is entitled to receive under the teachers' retirement system in order to become a member of the Public Employees Retirement Association, entitled to receive the retirement benefits accruing thereunder.

Philip R. Ashby

Assistant Attorney General