Opinion No. 60-21

February 9, 1960

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

TO: Senator Fabian Chavez, Jr. 404 San Antonio Santa Fe, New Mexico

QUESTION

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What is the correct method of computing retirement benefits under the Educational Retirement Act for those persons over 60 years of age eligible to receive such benefits under Chapter 197, Section 33, Laws of 1957?

CONCLUSION

See Analysis.

OPINION

*{*364}* **ANALYSIS**

Chapter 197, Section 33, Laws of 1957, then compiled as Section 73-12-66, N.M.S.A., 1953 Compilation (P.S.) reads as follows:

"A member shall be eligible for retirement benefits when he has acquired fifteen or more years of earned service-credit, and has attained the age of sixty years; **provided that a member who has acquired thirty or more years of earned and allowed service-credit may retire at any age and receive the actuarial equivalent of the retirement benefit he would be eligible to receive if he were to retire at the age of sixty years.**" (Emphasis supplied.)

This section is no longer in effect, having been amended by Chapter 341, Section 5, Laws of 1959, the present Section 73-12-66. The section now reads as follows:

"A member shall be eligible for retirement benefits, computed under section 73-12-60 New Mexico Statutes Annotated, 1953 Compilation, as amended, when he has acquired fifteen (15) or more years of earned service-credit and has attained the age of sixty (60) years. A member under sixty (60) years of age who has acquired thirty (30) years or more of earned and allowed service-credit may retire and receive the actuarial equivalent of the retirement benefits, provided for in Section 73-12-60 New Mexico Statutes Annotated, as amended, that he would be eligible to receive if he were to retire at the age of sixty (60) years."

Although Chapter 197, Section 33, Laws of 1957 has been amended by the 1959 legislation, it is our opinion that certain persons not covered by the 1959 amendment are still covered by its provisions. There are two possible classes of persons who could be so covered: (1) those who retired while the {*365} 1957 legislation was in effect, and (2) those persons who did not so retire but nevertheless were eligible for retirement thereunder.

We conclude that those persons who retired while such provisions were in effect are still entitled to benefits thereunder. This is because such section established a contractual relationship between the State and the person so retiring under which a vested right accrued to such person upon retirement. To hold otherwise would mean that the obligations under such contract between the State and the person retired would be impaired, in violation of Article 1, Section 10 of the Constitution of the United States. It is clear that contracts between a State and a private individual come within the purview of such prohibition of impairment of contract. 16 C.J.S. Constitutional Law, § 285.

However, the impairment of obligation of contract theory does not assist those persons eligible to retire under the 1957 section, but who did not actually retire thereunder. Clearly, the only rights which can be so impaired are those which have vested, and as we view the retirement law in question, no rights vest until retirement is effectuated.

May those persons who were eligible, but not retired, under the 1957 section still avail themselves of the provisions thereof by reasons of the savings clause of Section 73-12-63? In our opinion, they cannot. Section 73-12-63, (P.S.) reads as follows:

"No member who was heretofore covered under the provisions of any statute repealed by the Educational Retirement Act shall be retired at a monthly benefit which is less than he would have received had his employment continued to be performed under such repealed provisions."

This section, by its very terms, saves only those benefits obtained by persons retired under the Educational Retirement Act repealed by the enactment of the entire 1957 retirement act. It does not, by its terms, save benefits for which persons may be eligible under a section of the 1957 Act later amended. Savings clauses are almost always narrowly construed, i.e., they save only that part of repealed legislation specifically saved by the savings clause. 82 C.J.S., Statutes, Sec. 383. Therefore, we conclude that Section 73-12-63 does not save any benefits which might otherwise have later accrued to persons eligible for retirement under the now amended Chapter 197, Section 33, Laws of 1957.

We turn now to an analysis of the method of computing retirement benefits under the proviso of Section 33 of the 1957 Act. You will note that the recipient of the benefits may, under this section, be anyone under or over 60 years as long as he has acquired 30 or more years of earned and allowed service-credit. The benefit to these persons is based upon the actuarial equivalent of the retirement benefit **he would be eligible to receive if he were to retire at the age of 60 years.** The precise meaning of this

section is not at all clear. However, as we read it, the recipient would receive the actuarial equivalent of the monthly amount he would have been eligible, or if under 60. would be eligible to receive at the time he was, or is to be 60. The term "Actuarial Equivalent" is defined in Section 73-12-35 T as follows:

"Actuarial equivalent" means a sum paid as a present or deferred benefit which is equal in value to a regular benefit, computed upon the basis of interest rates and mortality tables."

There are two groups of persons over 60 years during the effective dates of the proviso in Section 33 that are affected by said proviso. These groups are:

1. Those persons retired while the section was in effect already over 60 and with more than 30 years' service at the time the proviso, {*366} along with the remainder of the Educational Retirement Act, became effective in 1957.

2. Those persons retired while the section was in effect who became 60 years of age during the effective life of the proviso, and had more than 30 years' service at that time.

Those in the first group attained age 60 with 30 or more years' service while the old Teachers' Retirement Act was in effect. Therefore, the base retirement amount upon which the actuarial equivalent is to be computed must be based upon the formula of Section 73-12-17, N.M.S.A., 1953 Compilation, repealed by the 1957 Educational Retirement Act. Those in the second group must use as a base for computation of the actuarial equivalent Section 73-12-60, N.M.S.A., 1953 Compilation (P.S.) spelling out the retirement pay formula under the 1957 Act.

We turn now to the first group. The formula under the now repealed Section 73-12-17 allowed a retirement benefit for those persons with 20 or more years' service in the amount of 60% of the average annual salary for the last 5 years of full employment preceding retirement with a ceiling amount of $ 1800 per year, or $ 150 per month. Persons in this group coming under the proviso of Section 33 should receive the actuarial equivalent of this amount. Therefore, assuming a person retiring at age 70 who would have received the full $ 1800 annual retirement at age 60, and a theoretical life expectancy of 12 years at age 60, but a theoretical life expectancy of 4 years at age 70, the annual retirement allowed under Section 33 would be three times $ 1800 or $ 5400, since the life expectancy at age 70 would be only one-third as long as at age 60.

We turn now to those persons in the second group. Under § 73-12-60, enacted in 1957 and still in force, base monthly retirements are computed as one-twelfth of a sum equal to 1 1/2% of the first $ 4,000 of average annual salary of the last 5 years under which a contribution to the retirement fund has been made and 1% of the remainder of such average annual salary multiplied by the number of years' service credit. Accordingly, the base retirement for a person with an average annual salary of $ 5,000 and 30 years' service credit would, upon retirement, be 1 1/2% of $ 4,000 of $ 60 plus 1% of $ 1,000, or $ 10, times 30 totaling $ 2100 annually or $ 175 monthly.

Chapter 147, Section 33 was in effect only from July 1, 1957 to June 12, 1959, the effective date of Chapter 341, Section 5, Laws of 1959. Therefore, the actuarial equivalent received by persons in the second group would only be a small increment when considered in relation to such equivalent received by persons in the first group. No one who was 60 on July 1, 1957 could be 62 on June 12, 1959. However, assuming an age of 61 upon retirement for a person in this group, and a theoretical life expectancy of 12 years at age 60 and 10 years at age 61, the person so retiring would receive 12/10th of his base retirement figure. In the case computed above, he would now, as an actuarial equivalent, receive 12/10ths of his base retirement figure. In the case computed above, he would now, as an actuarial equivalent, receive 12/10ths of $ 2100 annually, or $ 2520 annually ($ 210 monthly.)

We trust that your inquiry has been answered fully.

By: Philip R. Ashby

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