

Opinion No. 63-130

September 30, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. John C. Hays Executive Secretary Public Employees' Retirement Association
403 Don Gaspar Santa Fe, New Mexico

QUESTION

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Is the person who held the position of United States Property and Disbursing Officer in New Mexico from August 1, 1934 to September 16, 1940 to be considered a State employee during this period of time for purposes of retirement under the Public Employees' Retirement Act?

CONCLUSION

Yes.

OPINION

{*290} ANALYSIS

It must be noted at the outset that the property and fiscal officer (called property and disbursing officer prior to 1961) occupied a unique status in New Mexico, at least during the period in question. His appointment is governed by both State and Congressional enactment. The State statute, Section 9-2-6, N.M.S.A., 1953 Compilation, provided as follows during the time period in question:

"The governor shall appoint, with the advice of the adjutant-general, a property and {*291} disbursing officer, whose appointment shall be subject to the approval of the secretary of war . . . It shall be the duty of such officer to receive and account for all funds and property allotted or furnished by the United States to this state, for the use of the national guard, or other military organizations . . . he shall receive such salary and allowances for his service as such officer, as may be fixed by the war department, and commander-in-chief of the New Mexico national guard. He shall also make such reports and render such accounts as may be required by the governor. He shall hold such rank as may be authorized by regulations of the war department."

The Congressional enactment (Chapter 134, § 67, June 3, 1916, 39 Stat. 200) provided as follows during the applicable period:

"The governor of each state and territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the secretary of war, an officer of the National Guard of the State, Territory, or District of Columbia, who shall be regarded as property and disbursing officer for the United States."

The question arises whether the person who occupied this position during the period in question was a State employee or a Federal employee. An opinion (No. 57-294) was rendered on this same question in 1957. However, an additional fact has since come to light which we deem highly important, namely, the occupant of the position was paid by both the State and the United States during the period in question. The prior opinion was based on the premise that the individual had been paid only by the United States.

The definition of "employee" as contained in the Public Employees' Retirement Act (Section 5-5-1, N.M.S.A., 1953 Compilation (P.S.)) is as follows:

"'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.** The term shall include full time civilian employees employed through direct appointment or designation by the governor as commander-in-chief of the national guard or by the adjutant general, and whose salaries are paid by the United States from funds allocated to the national guard of this state." (Emphasis added)

In the same statute "public employer" is defined as "the state of New Mexico or any municipality in the state of New Mexico." Section 5-5-1, supra.

As the Judge Advocate General's Office has noted in a memorandum to the Comptroller of the Army, the status of property and disbursing officers has a long history and has received repeated consideration by the Comptroller and the Office of the Judge Advocate General. The Judge Advocate General states further:

"These opinions generally conclude that property and disbursing officers are State, rather than Federal, officers."

There are two Federal Circuit Courts of Appeal decisions on the matter which deal with issues other than retirement but where the crux of the determination was ^{*292} whether such property and disbursing officers are Federal or State employees. The first case, **Woodford v. United States**, 77 F.2d 861, held that such an officer was a Federal employee. In the second case, **United States v. Prager**, No. 16478, 5th Cir., the thrust of the decision was that such an officer is a state employee.

In the final analysis the conclusion in the present instance depends upon our State Statutes. The major factors to be considered for purposes of our Retirement Act are control and method of payment. Opinion Nos. 60-142, 57-231, 58-100, 57-291.

The property and disbursing officer during the 1934-40 period was paid just about equally by the State and the United States. This, taken in conjunction with the control exercised over him by the State Adjutant General and the Governor, leads us to conclude that this officer was a State employee during the period in question.

This opinion is limited to its own facts, particularly since we understand that the property and disbursing (fiscal) officer in New Mexico has been paid solely by the United States for a number of years.

Of course, the person in question must comply with the other provisions of the Public Employees' Retirement Act in order for this service credit to be granted him.

By: Oliver E. Payne

Assistant Attorney General