

## Opinion No. 64-43

March 31, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Mr. Kenneth A. Davis, Director, Educational Retirement Board Santa Fe, New Mexico

### QUESTION

#### FACTS

On December 6, 1963, the Educational Retirement Board adopted Board Resolution No. 71, which defines in part that a member's annual salary shall consist of: "A member's annual salary for purposes of contributions to the fund and for purposes of calculating benefits shall consist of total remuneration for services rendered by the member during each of the four calendar quarters of a fiscal year regardless of whether all such remuneration shall be paid directly to the member or to a third party on behalf, or for the benefit of the member, except that for a school bus owner-driver only 60% of the contract on the bus which he drives is to be covered."

#### QUESTION

Does such rule and regulation of the Educational Retirement Board defining salary to include all income derived by the member from public educational employment coincide with the intent of the Educational Retirement Act?

#### CONCLUSION

See analysis.

### OPINION

#### ANALYSIS

The Educational Retirement Act contemplates that each member subject to the provisions of the act will contribute a specific amount from his annual "salary" to an educational retirement fund. Section 73-12-57, N.M.S.A., 1953 Compilation sets out in part as follows:

"During the first two fiscal years a yearly contribution of a sum equal to three percent of each member's **annual salary** shall be made by him to the fund. During the third and following fiscal years the yearly contribution of each member shall be a sum equal to four percent of his **annual salary**. . ." (Emphasis supplied).

Section 73-12-59, N.M.S.A., 1953 Compilation, provides that "The contributions of members shall be deducted from their salaries by the local administrative units as the salaries are paid, and with membership fees, shall be forwarded to the state treasurer for deposit in the fund in quarterly payments."

Additionally, reference is made in Section 73-12-61, N.M.S.A., 1953 Compilation to the term "average annual salary" of a contributing member under the Educational Retirement Act.

The term "salary" in its general and usual meaning is inclusive of all earnings received by an employee during the course of his employment. As stated in **Washington Nat. Ins. Co. v. Employment Sec. Comm.**, 144 P. 2d. 688, 61 Ariz. 112:

"Salary" is generally defined as a "fixed annual or periodical payment for services, depending upon the time, and not upon the amount of services rendered. *Benedict v. United States*, 176 U.S. 357, 360, 20 S. Ct. 458, 459, 44 L. Ed. 503; *King v. Western Union Telegraph Co.*, 84 S. Ct. 73, 65 S.E. 944, 946."

In **State v. Abbott**, 48 A. 2d. 745, 4 Terry 472, the court there noted that:

". . . the word "salary" was used in each act in a usual and ordinary sense of that term: "the recompense or consideration paid, or stipulated to be paid to a person at regular intervals for services, esp. to holders of official, executive, or clerical positions; fixed compensation regularly paid, as by the year, quarter, month or week." *Webster's New International Dictionary*, 2d Ed., p. 2203."

After careful reading of the Educational Retirement Act, it is our opinion that the term "salary" as utilized therein includes all income derived by a covered member under such act and which is paid for services by the local administrative unit or which is paid to a third party on behalf or for the benefit of said member. In instances where a covered member receives two or more salary payments for work or services performed on behalf of the same **public employer** all such remuneration or compensation would be subject to payment of contributions under the Educational Retirement Act. Only compensation received by a covered member received from a non-public employer would be excepted from such contributions under the Educational Retirement Act. We feel that the above stated rule and regulation is in keeping with the intent and design of the Educational Retirement Act.