

Opinion No. 46-4908

June 14, 1946

BY: C. C. McCULLOH, Attorney General

TO: J. D. Robb, Dean College of Fine Arts University of New Mexico Albuquerque, New Mexico

{*235} We are in receipt of your letter of June 10, 1946 in which you recite the following facts:

"One of the members of the faculty joined the staff of the University in September 1929. He is now fifty-five years of age. Up to 1941 he served on a part-time basis. In 1941 he was placed on a full-time basis. His salary year for each fiscal year since then has been as follows:

1941-2 \$ 1800

1942-3 \$ 1800

1943-4 \$ 2000

1944-5 \$ 2200

1945-6 \$ 2400

In February this year he was notified, for reasons of teaching policy, that it would be necessary to put his teaching contract on a half-time basis at \$ 1200 per annum beginning on July 1, 1946, but that the University could probably make use of the other half of his time in a non-teaching capacity at an annual stipend of \$ 1200, making his total compensation \$ 2400 for the fiscal year. The administration of the University feels a moral responsibility not to take away, if it is legally possible to safeguard them, the inchoate rights of this employee (who has served the University faithfully for almost seventeen years) to a pension under the law."

In view of these facts, you ask several questions as to the applicability of Chapter 50 of the Laws of 1945, the present retirement law. The pertinent portions of this chapter are as follows:

"Section 1. The board * * * may * * * retire from active service and establish an emeritus employment status with any teacher, supervisor, custodian, nurse, principal, superintendent or other regular full time employee of the public schools or **any regular full time employee of the aforesaid state institutions** under the following conditions:
* * *

When the said teacher, supervisor, custodian, nurse, principal, superintendent, other regular full time employee of the public schools or **any regular full time employee of the aforesaid state institutions**, or said departments and boards, who is over the age of sixty (60) years, and has been employed in the public schools, or in said institutions

or departments, or in a combination of such services, of this state for at least fifteen (15) years, said person may be retired."

"Section 2. When any person who has served **as an employee** {*236} of the public schools, the state educational institutions, the State Board for Vocational Education, the state department of education, as state education budget auditor, as state director of retirement, or in any combination of said employments for (20) years or more is retired as herein provided, he shall be entitled to receive annually for the remainder of his natural life and beginning at the date of such retirement 60% of the average annual salary paid to him on account of his employment **during the five years of full time employment at full time salary** next preceding the date of retirement;"

As a preliminary to answering your questions I would like to analyze the statute generally. It appears that the Legislature created two classifications of employees entitled to retirement: First: teachers, supervisors, custodians, nurses, principals and superintendents; and, secondly, other regular full time employees. The first classification is limited to professional employees, while the second might include nonprofessional as well as professional employees. To qualify under the latter classification, the employee must be a regular and full time employee as distinguished from a part-time or special employee. I enclose herewith copy of Opinion No. 4741 dealing with this distinction.

Next the question arises whether the two classifications of employees must have worked full time throughout their entire 15 years in order to be entitled to retirement. Section 2 of this act demonstrates that the Legislature contemplated the retirement of at least some employees, even though they had not worked full time during their entire tenure, since it provides that their retirement shall be based on the average annual salary paid on account of employment "during the 5 years of full time employment at full time annual salary next preceding the date of retirement." Had the Legislature not contemplated that some employees entitled to retirement might not have worked full time during all of their last 15 years employment, there would have been no need for this provision.

Therefore, it is my opinion that a teacher or other person falling within the first classification may be retired even though not employed at full time during all of the 15 years. The same results will not necessarily follow as to a regular full time employee since to be entitled to retirement, such employee must be classified as a full time employee. Such a result seems strange, but must necessarily be true in order to give effect both to the language "regular full time employee" and the obvious legislative intent shown by the language "full time employment at full time annual salary" quoted above.

I turn now to your specific questions:

1. Does not the Act, Chapter 50, Seventeenth Legislature, providing for the retirement of super-annuated or disabled employees, etc. of state educational institutions apply to part-time as well as full-time employees?

It is my opinion the act applies to part-time employees who fall within the first classification, but not to those who fall within the second.

2. Does a year of part-time service count as a full year under the act named?

It is my opinion that it does as to employees within the first classification, but not as to those within the second.

3. Assuming that the employee referred to is employed on a full-time basis as above set forth (one-half time at teaching and one-half time at other duties) and is reengaged on a full-time basis each year until he attains the age of sixty, will he be entitled to a pension under the act if he then retires?

It is my opinion that the proper answer to this question is "yes" on either of two grounds. If the employee {237} is a full time employee, then he is entitled to retirement. In any event, since he would be teaching part-time and so classified as a teacher, he would be entitled to retirement as such. In determining the retirement pay, it appears that the entire sum paid to him on account of his employment should be used as a base.

In view of the newspaper reports of a controversy arising out of the facts related above, I want to make it clear that this opinion is limited strictly to the legal questions involved.

By ROBERT W. WARD,

Asst. Atty. General