Opinion No. 47-5112

December 15, 1947

BY: C. C. McCULLOH, Attorney General

TO: Mr. Epigmenio Ramirez, Secy., Public Employees' Retirement Assn, Santa Fe, New Mexico.

*{*116}* We wish to acknowledge receipt of your inquiry of December 9, 1947 wherein our opinion was requested as to whether or not persons serving the State, Counties, Cities and Municipalities under a fee or commission basis, or on retainer, are eligible to membership in the Public Employees' Retirement Association of New Mexico.

Section 2 of Chapter 167, Laws of 1947 provides as follows:

"Public Employee" shall mean *{*117}* any person holding a state, municipal, city, or county office in any capacity whatever whose **salary** is paid by warrant of the state, from the fees or income of any department, board, bureau or agency of the state, by a county, city or municipal warrant, or from fees or income of such county, city or municipality, excepting the officers or employees holding elective offices of the state, a county, a city, or a municipality, and excepting the professors and instructors and employees in the educational institutions within the state which have an established retirement plan for such employees, **and excepting temporary employees or those employed continuously for a period of less than one year."**

It is thus evident that the aforementioned act is only applicable to regular employees employed on a salary basis.

The Court in the case of McNair v. Allegheny County 195-A-118, 328 Pa. 3, held that "Fees" constitute payment for particular services performed, while "salaries" constitute fixed compensation for continuous services over a period of time.

In the case of Osborn v. Henry, 76 So. 119, 200 Ala. 353, the Supreme Court of Alabama likewise held that the term "salary" as applied to the compensation of a public officer for services rendered, does not denote the same class of compensation as indicated by the expression "fees," "Commission" and "percentages".

It is perhaps well to note that one employed under a general retainer has no reference to any special service, and that one so employed would, in our opinion, be eligible to membership in said association. However, in ordinary legal parlance, "retainer" is a client's act of engaging an attorney to manage a particular lawsuit or render a special service. (See Epps vs. Washington Co., 117 S.W. 2d 749.) In such instance the employment would be of a temporary character and the party employed would not be eligible to membership in said association.

Trusting the aforementioned satisfies your inquiry, I am

By ROBERT V. WOLLARD,

Asst. Atty. General