

## Opinion No. 51-5394

July 24, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Miss Ethel Vanderburg Director, Budgets and Finance Department of Education  
Santa Fe, New Mexico

{\*83} I am in receipt of your letter of June 18 in which you ask for an opinion interpreting various provisions of the Public Employees Retirement Act and the Teachers Retirement Act. In particular, you mention that there are some professional employees who have entered your Department since August 1, 1947, and who have not been paying into the Public Employees Retirement fund. You state that your reason for exempting them has been that prior to their employment they were, and still are, covered by the Teachers Retirement {\*84} Act. You ask whether or not these particular employees, who are former teachers, must join the Public Employees Retirement Association and pay into its fund.

In my opinion, the employees you describe are "public employees" within the meaning of the Public Employees Retirement Act, and must therefore join the Association and pay into the Retirement fund.

The meaning of "public employees", within the purview of the Public Employees Retirement Act, is contained in paragraph 2, § 3-1601, New Mexico Statutes Annotated, which reads as follows:

"2. 'Public employee' shall mean any person, including elective officials, holding a state, conservancy district, 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, conservancy district, city or municipal warrant, or from fees or income of such county, conservancy district, city or **municipality, excepting 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 (1) year."

A preliminary problem must be considered in connection with this definition. Is the State Department of Education, that is, its administrative office in Santa Fe, one of the "educational institutions within the state"? It is my opinion that it is not. 14 Words and Phrases, p.92, says: "An educational institution is one which teaches or improves its pupils; such as a school, seminary, college or educational establishment." Such a definition cannot be, of course, all-inclusive. A public library has been construed by some courts to be an educational institution, as have certain research centers. But I am of the opinion that an office such as yours, whose prime function is administrative, cannot be included in this definition.

It is clear, therefore, that the professional employees you mention are "public employees" within the meaning of the statute. The fact that they were once teachers in some of the educational institutions of the state is beside the point. It has been suggested that the legislature in the enactment of § 3-1601, paragraph 2, overlooked the fact that employees of the State Department of Education, as well as teachers, are covered by the Teachers Retirement Act, and that it was intended to exempt them also from the Public Employees Retirement Act. It is true that in the interpretation of statutes, the legislative intent is the controlling factor. Accordingly, the primary rule of construction of statute is to ascertain and declare the intention of the legislature, and carry such intention into effect. However, a statute is not open to construction as a matter of course, but only where its language is ambiguous, or obscure in meaning, and will bear two or more constructions. In my opinion, § 3-1601, paragraph 2, is plain and unambiguous in meaning. Such a statute is to be applied, and not interpreted. See 50 Am. Jur. 207. This being the case, the correction of a legislative oversight, if there be any oversight, is the task of subsequent legislative action and not a part of statutory interpretation.

§ 3-1602 further makes it clear that the employees you speak of, having entered your Department subsequent to the first of August 1947, must join the Public Employees Retirement Association. This section reads, in part: "Membership in said Association shall be optional on the part of the present public employees but all new public employees shall become members of said Association by acceptance of employment." In my opinion, there is no doubt that the legislature in the enactment of this provision {\*85} had the right to impose this condition of acceptance of employment. Furthermore § 55-1118, N.M.S.A., relating to the Teachers Retirement Act, makes it clear that the legislature contemplated, and provided for, the case of one who would be protected by the Teachers Retirement Act and who might also be entitled to the benefits of other retirement legislation. This section reads as follows:

"Effect of benefits under other state or national retirement or old age law. -- If any person retired under the provisions of this act (55-1114 -- 55-1118) shall also be entitled to benefits under any state or national retirement or old age benefit law, then the amount to be paid such person under this act (55-1114 -- 55-1118) shall be only the difference between the amount received under such other retirement or old age benefit law and the amount provided in this act (55-1114 -- 55-1118)."

Finally, if any of the employees we are considering does not work for a sufficient period of time as a "public employee" (see § 3-1613, N.M.S.A.) so as to be entitled to the benefits of the Public Employees Retirement Act, he will receive a refund of the payments he has made into this Retirement fund.

I hope that this opinion has answered all of your questions relative to this matter.