

Opinion No. 51-5433

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BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Epigmenio Ramirez Secretary Public Employees' Retirement Board Post Office
Box 925 Santa Fe, New Mexico

{*138} This letter is in answer to your request for an opinion from this office as to whether employees of the State Penitentiary come under the Public Employees' Retirement Act, and are obliged to pay into the Retirement Fund.

In considering your inquiry, two sections of the New Mexico Statutes Annotated must be examined. Concerning membership in the Public Employees' Retirement Association, § 3-1602 says:

"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."

§ 3-1601, paragraph 2, defines "public employees" as follows:

"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) years."

It is my opinion that Penitentiary employees, other than temporary employees and those employed continuously for a period of less than one year, come within the definition of 'public employees' as defined in paragraph 2 of § 3-1601, supra. Therefore, in my further opinion, all other persons who have entered the employment of the Penitentiary since the effective date of the Act in 1947 must join the Association and pay into its Retirement Fund. Those persons who were already employees at the time the Act went into effect had (and have) the option of joining the Association if they wish. See § 3-1602.

It has been suggested to this office that Chap. 69, Laws of 1941 (§§ 5-113 to 5-115 inclusive, N.M.S.A.), which provides that under certain conditions employees of the Penitentiary shall be entitled to retire on pension, makes ample provision for the retirement of Penitentiary employees. It is argued that therefore it could not have been

the intention of the Legislature to require any Penitentiary employee to join the Association. In my opinion, however, the Public Employees' Retirement Act is clear and unambiguous in its meaning, and is therefore not open to construction. The exceptions to those who must join the {*139} Association are expressly defined in the Act. Such a statute is to be applied and not interpreted. See 50 Am. Jur. 207.

Furthermore, if it is true, as has also been suggested, that the Legislature overlooked Chap. 69 of the Laws of 1941 in the enactment of the Retirement Act, the correction of such a legislative oversight is the task of subsequent legislative action and not a part of statutory interpretation.

Trusting that this opinion answers your inquiry on the subject, I remain