

Opinion No. 53-5790

July 28, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Epigmenio Ramirez Executive Secretary Public Employees' Retirement Association of New Mexico Santa Fe, New Mexico

{*197} On June 25, 1953, you addressed an inquiry to this office concerning the constitutionality of Section 2.1 (6) of Chapter 162 of the 1953 New Mexico Session Laws which reads as follows:

"Each annuitant and beneficiary receiving an annuity under the aforesaid Chapter 167, as amended, on the day preceding the effective date of this Act, shall continue to receive the same annuity; provided, however, that if any such annuitant or his beneficiary shall pay to the Association a lump sum payment equivalent to 1 1/2 per cent of the total salary received by him, during the last 5 years immediately preceding his retirement, the amount of his annuity shall be determined as hereinafter in this Act provided."

From the reading of this section, it appears that a beneficiary or annuitant who is actually receiving the annuity, is authorized to pay a lump sum payment to the Association equivalent to 1 1/2 per cent of his total salary received by him during the last 5 years of his employment and prior to his retirement, then he would be eligible to receive the additional benefits under the new Act.

The Supreme Court of New Mexico had before it a strikingly similar question in the case of **State vs. Trujillo, 46 N.M. 361 129 P. 2d 229**, and the language in that case lends aid to deciding the present problem.

The question involved is whether or not the additional annuity provided under this Act violates Section 14 of Art. IX of the New Mexico Constitution. The case of **State vs. Trujillo, supra**, holds and is authority for the constitutionality of retirement plans for public employees who are presently or may become in the employ of the State. It is also authority for the proposition that any additional payment to a person not presently employed by the State, under an act passed after retirement, is violative of the constitutional provision above cited. The Court {*198} cited the case of **O'Dea v. Cook et al., 176 Cal. 659, 169 P 366, 367**, wherein the Supreme Court of California held that "a pension became a gratuity only when it was granted for services previously rendered, and which at the time they were rendered gave no rise to legal obligation."

In the case of **Porter v. Loehr et al, 332 Ill. 353, 163 N.E. 689**, the Supreme Court of Illinois had a case before it in which pensions were increased just as the 1953 Amendatory Acts of the New Mexico Employees' Retirement law attempts to increase the amount of payment to annuitants and beneficiaries. The Court held "The

amendatory acts increasing pensions of retired policemen do not contemplate the rendition of additional services by the pensioners. They were paid when they performed their services and the amount of their pensions were fixed by law when they retired. The increases are not granted for services to be performed by the pensioners, but have as their sole basis or justification the services which they rendered prior to their retirement. * * * No obligation, either legal or moral, to pay more than the stipulated compensation arises where no additional services have been or will be rendered."

Section 2.1 (6) of Chapter 162 of the 1953 New Mexico Session Laws attempts to increase the amount of the annuity merely by having the employee purchase such increase by a payment of 1 1/2 per cent of a stated period of his previous service. The Court stated further in **State vs. Trujillo, supra**, "It is not enough that we can say that a public purpose is being served when we **donate** to those who have performed for the state a valuable public service over a period of 30 consecutive years. The Constitution (Art. XIV, Section 9) makes no distinction as between "donations", whether they be for a good cause or a questionable one. **It prohibits them all.**"

Therefore it is the opinion of this office that Section 2.1 (6) of Chapter 162 of the 1953 New Mexico Session Laws violates Section 140, Art. IX of the New Mexico Constitution and is therefore unconstitutional.

We sincerely hope that this answers your inquiry.

By: Fred M. Standley

Assist. Attorney General