

Opinion No. 54-5893

January 22, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Floyd Santistevan Director State Education Retirement Santa Fe, New Mexico

{*330} In your letter of January 12, 1954 you ask whether one Stella Sullivan is eligible for retirement under the Teachers Retirement Act.

It appears that Miss Sullivan last taught in New Mexico in 1950, and that at the time of the termination of her last contract of employment she met all qualifications for retirement. No formal application for retirement has as yet been submitted, but Miss Sullivan and the Jal Board of Education, her last school employer, have indicated that such application will be made upon ruling by this office that she is qualified to receive benefits under the Act.

The question is answered by the first paragraph of Section 55-1114 of the 1941 Compilation, as amended, which provides that boards of education, certain state departments and institutions;

* * * shall, upon request of any **employee** entitled to the benefits of this act (55-1114 -- 55-1121), or in the absence of such request may, but in any event with the approval of the state education retirement board, **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 aforesaid state institutions, boards, or offices, under the conditions hereinafter set out * * *"

You will note that this section provides for the retirement of employees from active service. Miss Sullivan is not now an employee of any of the enumerated boards, departments or institutions. She cannot be retired from active service, because she is not now in active service, and has not been in active service for several years. We believe that clearly Miss Sullivan does not come within the act. Any other interpretation would do violence to the plain wording of the statute, and might very well be contrary to our Constitution, **State ex rel Sena vs. Trujillo**, 46 N.M. 361, 129 P. 2d. 329.

In addition, sub-section (a) of the above quoted section provides, in part:

"* * * in every case not less than fifteen (15) years of educational service in New Mexico shall be required, of which the last five (5) years were service in New Mexico consecutively and immediately prior to the date of such retirement."

Inasmuch as Miss Sullivan has not been teaching for the last several years, she likewise does not meet this requirement.

Your attention is further directed to an additional provision of the above mentioned section, which provides that teachers who have more than thirty years service;

"shall be temporarily reemployed and retired under the provisions of this act, notwithstanding any requirement that such persons shall have served five (5) years consecutively and immediately prior to his or her retirement."

This exception is a clear indication that except as to persons with thirty years or more service, teachers must have five years of additional service in New Mexico immediately prior to their retirement. Further, it is an indication that the Legislature intended to limit retirement to persons {*331} in the employ of any of the various boards, agencies and institutions at the time of retirement by requiring, even as to those with more than thirty years' service that they be temporarily reemployed before retiring.

A different result might follow if the retiring board failed or refused to process a timely request of the employee.

We regret that through inadvertence on her part, Miss Sullivan must of necessity be denied the right to benefits under the Teachers' Retirement Act, but we feel that the wording of Section 55-1114, 1941 Compilation, as amended, at least in the absence of a Court decision to the contrary, permits of no other holding in the matter.

By: Walter R. Kegel

Assist. Attorney General