

## Opinion No. 55-6069

January 3, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. E. E. Thompson

In your letter dated December 22, 1954, you inquire whether teachers at the Industrial School are under the Teachers' Retirement Act and also whether they have the benefit of the teacher tenure laws.

Section 73-12-16 of the 1953 Compilation specifically authorizes employees entitled to the teacher retirement benefits at the Industrial School to participate in the Teachers' Retirement Plan. However, Section 73-12-21 of the 1953 Compilation provides that any State institution, including the Industrial School, may refuse to participate in said plan and if it fails to give notice of its desire to participate prior to June 30, 1948, it shall be deemed an election not to participate therein. Although your letter does not so state, it is my understanding that the Industrial School elected not to participate and, therefore, is not eligible at this time to participate in such plan.

In Opinion No. 5196, dated February 17, 1949, this office held that teachers at the Industrial School could participate in the Teachers' Retirement Plan without the institution contributing 3% of the teachers' salaries to the Retirement Fund. This opinion apparently was based upon the theory that since Section 73-7-39 of the 1953 Compilation provides that the Industrial School shall be **treated** as a school district in order to receive its distributive portion of the School Equalization Fund, that the teachers at the Industrial School should be considered the same as teachers in any other school district so far as retirement is concerned.

In **O'Neill v. Meyer**, 55 N.M. 257, the Supreme Court dealt with this question relative to teacher tenure at the Girls' Welfare Home and held that being **treated** as a school district to participate in School Equalization Funds was not sufficient to constitute the Girls' Welfare Home a legally constituted school district, and did not change its status from that of a State institution. The Court held that teachers at the Welfare Home did not come under the Teacher Tenure Act, and this holding would be equally applicable to the Industrial School with regard to teacher tenure.

Since the Industrial School is to be treated as a school district merely to receive Equalization Funds and is not a legally constituted school district, it seems to follow that teachers and other regular full-time employees of the Industrial School do not come under the Teachers' Retirement Plan in view of the fact that the Institution elected not to participate in this plan. If it is desired that the Institution be allowed to come under the plan, legislation for that purpose would be necessary.

It is my understanding that based upon the former opinion, which is hereby overruled, that certain teachers of the Industrial School have been retired. Since the opinion authorized such retirement and the same was legal when made, we feel that the status of persons so retired from the Institution under the Teachers' Retirement Act should not be disturbed. However, no further retirements should be granted based upon teaching service at the Industrial School. In order to fully protect the teachers heretofore retired, it is suggested that legislation for that purpose would also be appropriate.

By

C. C. McCulloh

Assistant Attorney General

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