

Opinion No. 55-6243

July 28, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees' Retirement Association of New Mexico, P. O. Box 2237, Santa Fe, New Mexico

Receipt is acknowledged of your letter dated July 15 in which you request an opinion as to whether or not a former employee of the Bureau of Revenue, who retired effective as of January 1, 1951, and is now getting an annuity, but who is now employed as a bailiff for the Second Judicial District, can be considered as an employee under the provisions of the Retirement Act, and if so, what steps can be taken to recover on the annuity paid to the employee during the time of his employment by the District Court.

Under subsection 2 of Section 5-5-13, N.M.S.A., 1953, is found the following:

"Any superannuation retirement annuity payable to any retired member shall be suspended for any period of service as an employee of any public employer and shall be resumed upon termination of such employment. During such suspension of his superannuation retirement annuity he shall not again become a member."

There is no question that the language of this statute is mandatory.

Another question that has to be decided is whether or not the employment as a casual or temporary employee or permanent employee can be considered as being employment that can be exempt.

The district judges are State officials and receive State moneys, so an employee of any district court is a Public employee even though he works for the district.

Under "Definitions" in § 5-5-1, N.M.S.A., 1953, subsections 7, 11 and 22, is found the following:

"7. 'Employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer. The term 'employee' shall not include any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the state of New Mexico or any of its political subdivisions.

"11. 'Contributing member' means any member who is making contributions to the employees' savings fund by payroll deductions and for whom an affiliated public employer is making payments to the employers' accumulation fund.

"22. 'Compensation' or 'salary' or 'regular salary' means all compensation for service, except overtime service, and shall include, after June 30, 1953, the reasonable cash value of all maintenance regularly allowed any employee in any medium other than cash, such reasonable cash value to be determined in accordance with rules prescribed by the retirement board."

Under these definitions, there is no question that a bailiff is a public employee and is not entitled to be so employed under subsection 2 of § 5-5-13, N.M.S.A., 1953, hereinbefore set out.

It is, therefore, the opinion of this office that the employee's annuity should be suspended. However, probably the best method of collecting from the employee is to bring suit to recover the same from the date that he was employed by the district unless he will reimburse the retirement fund voluntarily.

Trusting that this fully answers your inquiry, I remain

By Hilario Rubio

Assistant Attorney General