

Opinion No. 55-6291

September 26, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Kenneth S. Barnhill, Chief Probation Officer, Third Judicial District, Las Cruces, New Mexico

Receipt is acknowledged of your letter dated September 3, 1955, in which you request an opinion from this office on the following:

1. As to your status as an employee of the District Judge, W. T. Scoggin, of the Third Judicial District. You state that Article V, Sections 5-5-1 to 5-5-23, inclusive, N.M.S.A., 1953, makes no mention of employees of Judicial Districts, but mentions state, county and municipal employees as coming within the provisions of the Retirement Act.

Subsection 4 of Section 5-5-1, N.M.S.A., 1953, reads as follows:

"4. 'Municipality' means any municipality, city, county and conservancy district in the state of New Mexico, including the boards, departments, bureaus and agencies of the said municipality, city, county or conservancy district."

Subsection 5 of Section 5-5-1, N.M.S.A., 1953, reads as follows:

"5. 'Public Employer' means the state of New Mexico or any municipality in the state of New Mexico."

Section 1 of Article X of the New Mexico Constitution reads as follows:

"The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this Constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county."

Section 16-3-22, N.M.S.A., 1953, reads as follows:

"For the purpose of maintaining the district courts in the several counties of this state, there shall be levied by the county commissioners of each county in every year, a tax not to exceed one (1) mill upon each dollar of taxable property, sufficient to provide a court fund in such amount as may be determined and fixed by the district court and state tax commission as herein provided; that on or before the first day of May of each year the district judge of each judicial district in the state shall make an estimate of revenue required for the ensuing year in each county of his district for court purposes, including salaries and expenses chargeable against the court fund as provided by law

and shall certify the same to the state tax commission. The state tax commission shall forthwith determine the amount of revenue required for such purpose and shall certify to the board of county commissioners in each county the estimate for such county, and such estimate, when so made and certified, shall not be altered or changed except upon order of the state tax commission. Said tax shall be collected in the same manner as other taxes are collected and shall be known as the Court Fund; when collected it shall be turned over to the county treasurer, to be by him disbursed for the payment of the expenses of the district court in his county only as provided by law or upon a certificate of the clerk of the district court of the district in which his county is situated, that an allowance has been made by said court, and no court shall authorize the issuance of any certificate on any account whatsoever unless there shall be at the time money in the county treasury to meet and pay such certificate, and said clerk shall immediately after the close of any term of court, transmit to said treasurer a certified list of all allowances made by said court at such term, and any such treasurer who shall disburse any of the money provided for in this section except as provided by law or as herein provided shall be deemed guilty of a felony, and upon conviction thereof shall be confined in the state penitentiary not less than two (2) years nor more than ten (10) years."

Our Supreme Court has held that the compensation under the provisions of Section 1, Article X of our State Constitution quoted above, is dependent upon the enactment by the Legislature of a salary law, and one cannot recover for his services until such a law is passed, and then only as provided by such Act. See **Delgado v. Romero**, 17 N.M. 81, 124 P. 649; **Herbert v. Board of County Commissioners**, 18 N.M. 129, 134 P. 204.

Under Section 13-8-14, N.M.S.A., 1953, and Chapter 287, New Mexico Session Laws of 1955, at page 785, the probation officer in the various counties of New Mexico gets a portion of this state fund, but it is apportioned to each county and paid into the court fund of each county.

It is evident from all the above quoted authorities that probation officers are county employees, deriving their funds mostly from county funds but being under the control of the district judges of the district courts of New Mexico, who appoint them and pay them out of the court fund of each county.

Your second question is as to the source of employees' contributions.

Section 16-3-22, N.M.S.A., 1953, quoted above, describes in full the source of county funds from which its county court fund is derived.

It is, therefore, the opinion of this office that the court fund of each county in New Mexico is the probable source from which contributions for probation officers shall be paid to the Public Employees' Retirement Board, although there is no prohibition from paying from other funds.

Your third question is as to when you become a member of the Public Employees' Retirement Association; whether at the time of your initial employment or at the time of rendering this opinion.

Under Section 2 of Chapter 167, New Mexico Session Laws of 1947, if an employee of the state, municipality, city or county did not make application for membership in the Public Employees' Retirement Association, he or she automatically were exempt from membership in the Association.

Under Section 2 of Chapter 174, New Mexico Session Laws of 1949, every new public employee shall become a member of the Association by acceptance of employment.

It is, therefore, the opinion of this office that if any of the probation employees were employed in 1947 or prior, and did not make application for membership in 1947 when Chapter 167 of the New Mexico Session Laws became effective, they were automatically exempt from membership in the Association. If the probation employees of the three counties in the Third Judicial District were employed after the effective date of Chapter 174, New Mexico Session Laws of 1949, said employees became members of the Public Employees' Retirement Association upon their acceptance of employment as probation officers, if their respective counties come within the Public Employees' Retirement System.

Trusting this fully answers your inquiries, we remain

By Hilario Rubio

Assistant Attorney General