

Opinion No. 56-6449

May 28, 1956

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

In your letter of May 17, 1956, you state that the City of Albuquerque has recently submitted an application for non-duty disability annuity for one of its employees. You further state that this particular employee became a member of the Retirement Association September 1, 1954, the date the City of Albuquerque became a member of the Association. In other words this employee has only about one year and eight months of contributing service.

You state that in view of Section 5-5-18, N.M.S.A., 1953 Compilation, you want an opinion as to whether or not this particular employee of the City of Albuquerque would be entitled to a non-duty disability annuity. We believe that Section 5-5-18, N.M.S.A., 1953, governs your problem.

Section 5-5-18, N.M.S.A., 1953 Compilation, reads as follows:

"Upon the application of a member, or his department head, a member who (1) is in the service of an affiliated public employer, (2) has 10 or more years of total service credit, **of which at least 5 years is contributing service**, and (3) becomes totally and permanently incapacitated for duty in the service of his affiliated public employer as the result of causes occurring otherwise than in the course of his employment with his affiliated public employer, may be retired by the retirement board: Provided, that after a medical examination of the said member made by or under the direction of a medical committee, consisting of 1 or more physicians designated by the retirement board, (1) that said member is mentally or physically totally incapacitated for duty in the service of his affiliated public employer, (2) that such incapacity will probably be permanent, and (3) that said member should be retired." (Emphasis supplied)

Section 5-5-18, N.M.S.A., 1953 Compilation, specifically provides that when a member makes application for non-duty disability he must, (1) be in the service of an affiliated public employer, (2) employee must have ten or more years of total service credit, **of which at least five years is contributing service**, and (3) becomes totally and permanently incapacitated for duty in the service of his affiliated public employer as a result of causes occurring otherwise than in the course of his employment with his affiliated public employer, he may be retired by the Retirement Board.

There is no question in our minds that the five years of contributing service for each employee was placed in Section 5-5-18, N.M.S.A., 1953 Compilation, hereinabove quoted, by the Legislature, with the intent that it be a safeguard to protect the

association and the Board from retiring employees for non-duty disability when they enter the service of the State or any of its agencies, and who were already disabled and could work for the State or its agencies for a few weeks or months and then claim non-duty disability.

The Albuquerque employee which you have reference to has not complied with the five year provision as a contributing member and is not entitled to non-duty disability, when he has only been a contributing member for one year and eight months.

It is therefore the opinion of this office that the Albuquerque employee mentioned in your letter, is not entitled to non-duty disability, for the reason that he has not been a contributing member of the Association or the affiliated public employer, namely, the City of Albuquerque, for at least five years.

Trusting that this fully answers your inquiry, we remain

By: Hilario Rubio

Assistant Attorney General