

Opinion No. 56-6542

November 9, 1956

BY: RICHARD H. ROBINSON, Attorney General

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

Receipt is acknowledged of your letter dated October 17, 1956, in which you request an opinion on the following fact situation.

It appears that since the recent audit was made of the City of Raton and its agencies, one Abner Osborn was an employee of the Board of Public Works of the City of Raton on August 1, 1947, and continued to be an employee until his death in December, 1955. The City of Raton became affiliated voluntarily as of August 1, 1947, to the Public Employees Retirement Association. However, no deductions were made from Mr. Osborn's salary, but according to your statement the widow is willing to pay the salary contributions for him.

Under Chapter 167 of the Laws of 1947, the same being subsection (b) of Paragraph 3, Section 2, employees had 90 days from the date of the affiliation with their employer to become a member of the Association or to claim exemption by signing an exemption form.

The 1953 Act carries the same provision and is found in Paragraph 2 of Section 5-5-6, N.M.S.A., 1953 Compilation.

You state that the widow of Mr. Osborn is claiming an annuity under Paragraph 2 of Section 5-5-16, N.M.S.A., 1953 Compilation, which reads as follows:

"Any member who continues in the service of an affiliated public employer on and after his voluntary retirement date and does not make an election of option 3 as provided in section 16.1 (subsection 1), and (1) dies prior to his retirement from said service, and (2) leaves a widow, or in the case of a female member leaves a husband whom the retirement board finds to be totally and permanently disabled and to have been dependent upon the said female member for at least 50 per cent of his support, the said widow or dependent husband, as the case may be, shall receive an annuity computed in the same manner and in all respects as if the said member had (1) retired effective the day preceding the date of his death, (2) elected option 3 provided for in section 15.1 (5-5-15, subsection 1), and (3) nominated his said widow or her dependent husband as survivor beneficiary. . . ."

Mr. Osborn did not exempt himself either under the 1947 Retirement Act or under the 1953 Retirement Act, and he continued to be an employee of the City of Raton. The City of Raton has made its contributions, and the widow is willing to make the contributions

which the City failed to deduct from his salary. There is no question that Mrs. Osborn, the widow of Mr. Abner Osborn, is entitled to an annuity as provided in Paragraph 2 of Section 5-5-16, N.M.S.A., 1953 Compilation, and the annuity should be paid her upon receipt of her check for the total amount of the monthly contributions that should have been deducted by the City of Raton.

It is therefore the opinion of this office that Mrs. Osborn is entitled to receive the annuity for her husband Abner Osborn, after she has paid the contributions that were supposed to have been deducted by the City of Raton every month until the time of his death, with interest.

I trust the above answers your inquiry.

By: Hilario Rubio

Assistant Attorney General