

Opinion No. 57-164

July 10, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilario Rubio, Assistant Attorney General

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

QUESTIONS

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1. Are employees of the Museum of New Mexico hired after July 1, 1957 - the effective date of the new Teachers Retirement Act - as well as those employees of the Museum who elect to exempt themselves under the Teachers Retirement Act, required to become members of the Public Employees Retirement Association?
2. If conclusion to above question is in the affirmative, how does this affect employees of other state institutions such as the University of New Mexico, School for the Deaf, Northern Normal, and other New Mexico State institutions?

CONCLUSIONS

1. Yes.
2. See analysis.

OPINION

ANALYSIS

Subsections 3, 5 and 7 of Section 5-5-1, N.M.S.A., 1953 Compilation define "state", "public employer", and "employee" as follows:

"State' means the state of New Mexico, and includes its boards, departments, bureaus and agencies."

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

"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."

Section 5-5-6, N.M.S.A., 1953 Compilation, reads as follows:

"Membership in Association. -- 1. Except as provided in section 6.2 (subsection 2), **all employees of an affiliated public employer shall become members of the association beginning with the date their public employer became an affiliated public employer.** Any elected official of an affiliated public employer shall become a member of the association upon his written application filed with the retirement board. (Emphasis ours.)

"Persons Exempted from Membership. -- 2. Any employee in the service of an affiliated public employer at the time of affiliation of such public employer with the retirement association may exempt himself from membership in the association by filing with his city treasurer, county treasurer or department head, as the case may be, a written application for exemption, and a copy of the same being filed with the retirement board within 90 days from date of such affiliation. The retirement board may exempt from membership employees in occupational classification of a part-time, temporary, seasonal or casual nature.

"Exempted Persons Returned to Membership. -- 3. Any employee of an affiliated public employer who has exempted himself or is exempt from membership in the association, as provided in section 6.2 may become a member by filing his written application with the retirement board: Provided, that in no case shall such a member be allowed credit for service rendered prior to the date his said application for membership is filed with the retirement board, except prior service.

"Membership Terminates. -- 4. Except as otherwise provided in this act, should any member separate from the services of an affiliated public employer, for reasons other than becoming an annuitant, he shall thereupon cease to be a member, and the total service credited to him at the date of his said separation from service, shall be forfeited by him. In the event the said person is reemployed by an affiliated public employer he shall again become a member of the association. Should his said reemployment occur with a period of 5 years from and after the date he last separated from the service of an affiliated public employer, the total service forfeited by him, at the time of his said last separation from service, shall be restored to his credit: Provided, that the said member returns to the employees savings fund the full amount of accumulated deductions he may have previously withdrawn therefrom, together with regular interest computed from the date of withdrawal to the date or dates of repayment. In the event a member becomes an annuitant, by reason of his retirement, he shall there upon cease to be a member.

"Membership Fees. -- 5. Persons upon becoming members of the association shall pay a membership fee of \$ 5.00. The said membership fees shall be credited to the income fund."

Since the Museum of New Mexico is a state institution, its employees are not required to affiliate themselves as are municipal employees. And, employees of the Museum of New Mexico automatically become members of the Public Employees Retirement Association by virtue of their employment by the Museum, effective the day of their employment after July 1, 1957, since the Museum is an affiliated employer of the State.

In view of the above quoted sections of the Public Employees Retirement Act, it is our conclusion that all new employees of the Museum of New Mexico, hired after July 1, 1957, become members of the Public Employees Retirement Association immediately upon their employment by the Museum of New Mexico, a state institution and an affiliated employer.

Concerning those employees under the Educational Retirement and Disability of Personnel Act, same being Chapter 197 of the New Mexico Session Laws of 1957, under subsection B of Section 2, "full time employees" are defined as follows:

". . . full time employees of the state or public school districts or boards of education who are employed as teachers or administrators and for holders of regular teachers' or administrators' certificates issued by the state board of education, excluding county school superintendents who have no rural schools under their supervision."

Therefore, under this definition, full time employees of the State, of public school districts or boards of education include only teachers and administrators who are holders of regular teachers or administrators certificates issued by the State Board of Education.

Under the second paragraph of Section 20 of the new Retirement Act is found the following:

"Persons who enter employment after the effective date of the Educational Retirement Act and who are covered under such other retirement program may exempt themselves from membership under the Educational Retirement Act by filing written declaration of exemption with the director not later than six months after commencement of their employment."

It follows, therefore, that an employee of the State Museum who elects to exempt himself from the educational retirement act by filing written declaration of exemption with the Director not later than December 1, 1957, as provided in Section 20 of the new Teachers Retirement Act, becomes a member of the Public Employees Retirement Act by virtue of being an employee of the Museum, a state institution.

Under the old Teachers Retirement Act, the Supreme Court of the State of New Mexico, in the case of **State ex rel Public Employees Retirement Board v. Mechem**, 58 N.M. 495, 273 P. 2d 361, held that exemption of employees covered by the Teachers Retirement Act does not thereby exclude such employees from coverage under Public Employees Retirement Act, but gives such employees a right to elect.

Concerning the second question propounded above, Section 11 of Article 12, New Mexico Constitution, enumerates the state educational institutions as follows:

"The University of New Mexico at Albuquerque, the New Mexico College of Agriculture and Mechanic Arts near Las Cruces, the New Mexico School of Mines at Socorro, the New Mexico Military Institute at Roswell, the New Mexico Normal University at Las Vegas, the New Mexico Normal School at Silver City, the Spanish-American School at El Rito, the New Mexico Asylum for the Deaf and Dumb at Santa Fe, and the New Mexico Institute for the Blind at Alamogordo, are hereby confirmed as state educational institutions. The appropriations made and that may hereafter be made to the state by the United States for agricultural and mechanical colleges and experiment stations in connection therewith, shall be paid to the New Mexico College of Agriculture and Mechanic Arts."

It was held in the case of **State vs. Regents of the University of New Mexico**, 32 N.M. 428, 258 P. 571, that by this Section of our State Constitution the State of New Mexico was made owner of the state educational institutions hereinabove enumerated. It is plain from reading Chapter 197 of the New Mexico Session Laws of 1957 that all employees of the above enumerated state institutions who are not certified as teachers or administrators are left out of the new Teacher Retirement Act. It therefore follows, from the above authorities, that employees of the State educational institutions who are not certified as teachers or administrators are not covered by the new Teachers Retirement Act, and thus become members of the Public Employees Retirement Association by virtue of their employment as employees of the above enumerated institutions which are institutions of the State of New Mexico.