

Opinion No. 57-216

August 27, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: The Board of Regents, New Mexico Military Institute, Roswell, New Mexico

QUESTION

QUESTIONS

1. Is the Institute required to make any contribution to the State Educational Retirement Fund under the authority of Chapter 197, of the Laws of 1957, as to any employee covered by the Institute plan who has exempted himself from said act as provided therein?
2. Can any employee now covered by the Institute plan, and who exempts himself from the new state educational retirement plan as provided, hereafter retire in accordance with the provisions of Article 73-12-16 (1953 Statutes), and receive the amount of retirement pay now provided for in Article 73-12-17?
3. Is the Institute required to make a contribution for employees under the Educational Retirement Act of 1957 for employees covered under the Institute program who elect to exempt themselves from the provisions of the Educational Retirement Act of 1957?
4. What effect will an employee exempting himself from the new act have upon contributions heretofore made by the Institute to the teachers retirement fund under the authority of Article 73-12-27 of the 1953 Statutes?
5. Can an employee who has not exempted himself from the provisions of the 1957 Act, become eligible for and receive the benefits provided for in the 1957 Act, and also receive additional benefits provided for under the Institute program?
6. Can an employee covered by the Institute plan, who does not elect to exempt himself from the new plan, participate therein, cause the Institute to contribute thereto, and thereafter retire and receive benefits under both plans provided he has met the requirements of the same?

CONCLUSIONS

1. No.
2. No.

3. No.
4. None.
5. No.
6. No.

OPINION

ANALYSIS

In answer to your first question, we assume that the particular employee of the Institute has exempted himself from the Educational Retirement Act, (§ 73-12-34 et seq., N.M.S.A., 1953 Compilation, 1957 Supplement), as is therein provided. We find nothing in the Act requiring the Institute to make contributions to the educational retirement fund on behalf of such employee under such a set of facts. Indeed, §§ 73-12-57 and 58, which respectively read as follows:

"73-12-57. Member contributions. -- During the first two (2) fiscal years a yearly contribution of a sum equal to three per cent (3%) of each member's annual salary shall be made by him to the fund. During the third and following fiscal years the yearly contribution of each member shall be a sum equal to four per cent (4%) of his annual salary, except the legislature may provide for a higher rate of contribution after the third fiscal year if the report of the actuary establishes a higher rate is necessary to sustain the level of benefits provided by the Educational Retirement Act, but in no instance shall the rate of the member's contribution exceed that of the local administrative unit.

73-12-58. Local administrative unit contributions. -- Local administrative units shall make a yearly contribution to the fund during the first two (2) fiscal years of a sum equal to four per cent (4%) of their respective salary pay rolls for members. During the third and following fiscal years the local administrative units shall make yearly contribution at the rate of five per cent (5%) of their salary pay rolls for members, except the legislature may provide for a higher rate of contribution after the third fiscal year if the report of the actuary establishes a higher rate is necessary to sustain the level of benefits provided by the Educational Retirement Act." (Emphasis ours)

would seem to clearly negate any such liability on the part of the Institute. This reasoning also applies to your third question.

The answer to your second question depends upon whether §§ 73-12-16 and 17, N.M.S.A., 1953 Compilation, are now in effect for any purpose. Laws 1957, Chapter 197, § 60, being the repealing section of the Educational Retirement Act, repealed the above two sections of the 1953 Compilation. Nor do we find any reference to these two sections in the saving clause of the new act, being § 73-12-53, N.M.S.A., 1953 Compilation, 1957. Supplement. Further, by the express terms of another saving

section, being § 73-12-64, N.M.S.A., 1953 Compilation, 1957 Supplement, it is not applicable to this situation since it is limited to those who have "heretofore" retired. We answer your second question in the negative.

We do not believe that the situation contemplated by your fourth question will be affected by the employee exempting himself from the new act. Pursuant to § 73-12-27, N.M.S.A., 1953 Compilation (now repealed), you had heretofore paid contributions into the teachers retirement fund. However, all assets of this fund were, by § 73-12-44, N.M.S.A., 1953 Compilation, 1957 Supplement, transferred to the new educational retirement fund and we know of no provision of law authorizing a withdrawal from the latter fund under this or any other situation. You will also note § 73-12-63, N.M.S.A., 1953 Compilation, 1957 Supplement, which provides:

"No member who was heretofore covered under the provisions of any statute repealed by the Educational Retirement Act shall be retired at a monthly benefit which is less than he would have received had his employment continued to be performed under such repealed provisions."

By reference in your fifth question to the "Institute program," we assume you have reference to your plan authorized by § 73-12-26, N.M.S.A., 1953 Compilation, (again, one of the sections repealed by the Educational Retirement Act). We further assume that you have reference to a future contemplated retirement by one presently employed by the Institute, which employment was in effect prior to July 1, 1957. We turn to the various saving clauses in the Educational Retirement Act.

The first paragraph of § 73-12-53, N.M.S.A., 1953 Compilation, 1957 Supplement, reads:

"Nothing contained in the Educational Retirement Act shall be construed to affect in any manner membership in or coverage under the retirement programs pursuant to sections 73-12-26 and 73-12-30 New Mexico Statutes Annotated, 1953 Compilation relating to institutional programs, or the program for the retirement of public employees pursuant to sections 5-5-1 through 5-5-23 New Mexico Statutes Annotated, 1953 Compilation of persons covered thereunder who are in positions of employment on the effective date of the Educational Retirement Act **elect to exempt themselves from membership under the Educational Retirement Act** by filing written declaration of exemption with the director not later than December 1, 1957," (Emphasis ours)

This provision does not determine the problem, since it presupposes an election of exemption, whereas your problem deals with future participation in benefits from two plans (one being the new act).

Turning to § 73-12-63, N.M.S.A., 1953 Compilation, 1957 Supplement, which states:

"No member who was heretofore covered under the provisions of any statute repealed by the Educational Retirement Act shall be retired at a monthly benefit which is less

than he would have received had his employment continued to be performed under such repealed provisions."

we think it is not applicable, since it simply acts as a protection against decreased benefits.

One reason that the first paragraph of § 73-12-64, N.M.S.A., 1953 Compilation, 1957 Supplement, reading as follows:

"All persons who have **heretofore** been retired under the provisions of sections 73-12-16 through 73-12-19, 73-12-24, 73-12-27 through 73-12-29, 73-12-31 and 73-12-32 New Mexico Statutes Annotated, 1953 Compilation, upon the basis of service and age, shall be deemed to have retired under the Educational Retirement Act and shall continue to receive retirement benefit in the same amount which they were heretofore receiving." (Emphasis ours)

is not governing is that it contemplates retirement, not in the future, but "heretofore."

Section 73-12-65 reads as follows:

"Nothing contained in the Educational Retirement Act shall be construed to affect adversely the continued payment of benefits, either for retirement or for disability, which upon the effective date of the Educational Retirement Act **are being paid** to any person pursuant to sections 73-12-26 and 73-12-30 New Mexico Statutes Annotated, 1953 Compilation relating to institutional programs, or the program for retirement of public employees pursuant to sections 5-5-1 through 5-5-23 New Mexico Statutes Annotated, 1953 Compilation.' (Emphasis ours)

But it does not answer your fifth question since it applies to benefits which are (or were) being paid on July 1, 1957. As we understand your problem, this is not the case.

So much for the sections of the new act which might be said to be controlling. Reading the act in its entirety, we find that § 73-12-26 was a section repealed. Since it has not been "saved" insofar as your particular problem is concerned, we can only conclude that the employee in question cannot, in the future, obtain benefits under both the Institute plan pursuant to § 73-12-26 and the Educational Retirement Act.

Your sixth question contemplates, in part, the opposite situation then obtained **under your** first and third questions. So, since the employee in question participates under the Educational Retirement Act, the Institute will have to make a contribution. As to the balance of your sixth question, our answer to your fifth question governs.