

## **Opinion No. 57-272**

October 24, 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**

#### QUESTION

Under the original retirement plan of NMMI, social security benefits were deducted from retirement benefits in computing the net amount payable.

1. Thereafter, could NMMI lawfully amend its plan to eliminate the social security deduction?
2. May the action taken in the first question now be rescinded?

#### CONCLUSIONS

1. No.
2. Yes.

### **OPINION**

#### ANALYSIS

Pursuant to § 73-12-26, NMMI adopted its own retirement plan for its instructors. In Subsection 4 of Section 2 of said plan, according to attached correspondence, which was adopted in 1946, there was a provision deducting social security benefits from benefits otherwise payable under the aforesaid institutional retirement plan.

So matters stood until 1949, when by Laws 1949, Ch. 137, Sec. 4, now appearing as § 73-12-30, N.M.S.A., 1953, the Legislature made, in our opinion, a significant restriction upon alteration of benefits payable under the institutional plan. The last cited section reads:

"Nothing herein contained shall be construed to affect, modify or annul contracts entered into pursuant to such institution's retirement plan heretofore made a part of said contracts and now in force between such institution and its emeritus employees, teachers and regular full time employees, but when any teacher or regular full time employee now in the employment of such institution shall retire with pay in excess of

that provided by the statutes of New Mexico, such institution shall pay the difference between the amount which said teacher or regular full time employee may be entitled to receive under the retirement plan heretofore adopted by such institution and made a part of teachers and regular full time employees' contracts, and the amount provided by statutes in the State Retirement Law. Said difference may, by such institution, be paid from such funds as may have been mutually contributed by any such teacher or regular full time employee, and said institution in compliance with the provisions of said retirement plan of such institution or from such other funds as the board of regents may prescribe. **Provided, however, that the retirement pay of any teacher or regular full time employee heretofore engaged and now employed by such institution under its said retirement plan, shall be no less, nor more, than that provided in said retirement plan established by such institution prior to the passage of this act.** Provided, further, that whereas, the retirement plan established by such institution prior to the passage of this act and agreed to by the teachers, regular full time employees and emeritus employees and such institution has made provision for retirement at 50 years of age, then any obligation of such institution arising by reason of said plan prior to the time said teacher or regular full time employee reaches the age of 60 years, shall be an obligation solely of such institution and satisfied from funds accumulated through the mutual contributions of such institution and such teachers and regular full time employees, or from such funds as such institution may otherwise provide; but nothing herein shall prevent any said teacher, or regular full time employee of such institution from receiving the benefits provided in the state retirement plan when he shall have, on account of age and service, become eligible therefor." (Emphasis ours.)

In the face of this statute and previous status of the plan, the Board, on October 6, 1955, passed the following resolution:

"The full retirement benefits to which an employee may be entitled under either the Institute or the State of New Mexico retirement plan shall not be reduced by any payments which the employee may receive under Social Security or any other national retirement law."

It is the opinion of this office that said resolution was contrary to the restriction contained in § 73-12-30, supra, since such resolution clearly purports to increase benefits payable under the original plan. We are of the further opinion that said resolution was void, contrary to law, and created no rights, contractual or otherwise.

It follows from the foregoing that the resolution of October 6, 1955 was illegal and hence the answer to the first question is in the negative.

As to your second question, not only may the Board rescind its illegal action of October 6, 1955, but should proceed to do so with all dispatch.

We are cognizant that the two above cited provisions of law have been repealed. See Laws 1957, Ch. 197, Sec. 60 (being the penultimate section of the Educational Retirement Act). However, for the purposes of this opinion, the provisions of §§ 73-12-

26 and 30 are still effective. See the savings clauses of the Educational Retirement Act, particularly §§ 73-12-53 and 73-12-65, N.M.S.A., 1953 Comp., 1957 Suppl.