

Opinion No. 58-168

August 14, 1958

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

TO: Mr. Floyd Santistevan, Director, Educational Retirement Board, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. "Will you please advise us in an opinion as to whether a regular member under the provisions of Chapter 197, Laws of 1957, with seven years of New Mexico educational service can become eligible to submit an application for disability retirement benefits by purchasing three years of allowed service credit (Section 44)?"
2. "If your answer is in the affirmative and the applicant substantiates a disability sufficient to qualify for benefits should the benefits then be computed under the savings clause of the 1957 Educational Retirement Act (Section 2 K and Section 30), or should the formula (Section 27) of the Educational Retirement Act be applied?"

CONCLUSIONS

1. No.
2. Not necessary to answer.

OPINION

ANALYSIS

Section 44 of the Educational Retirement Act, referred to by you in your request letter, appears as § 73-12-77, N.M.S.A., 1953 Comp., 1957 Supp., and provides:

"A member shall be eligible for disability benefits when he has acquired ten (10) or more years of **earned service-credit** and when, following examination by the medical authority and report to the board thereon, he is certified by the board to be totally disabled to continue his employment and unable to obtain and retain other gainful employment commensurate with his background, education and experience."
(Emphasis ours)

We must accordingly determine whether the following record, as submitted by you:

"6 years New Mexico service prior to July 1, 1957 1 year contributory employment (1957-58) Has 3 years of out-of-state service eligible to be purchased as allowed service credit."

constitutes at least ten years of earned service-credit, so as to qualify under § 73-12-77.

Earned service-credit is at least partially defined in § 73-12-71, N.M.S.A., 1953 Comp., 1957 Supp., as follows:

"Earned service-credit shall be certified by the director, subject to review by the board, upon a member's application for retirement or disability benefits for the time when the member was a **contributing member in employment**; Provided that earned service-credit shall not be certified for periods of employment the contributions for which have been withdrawn from the fund by the member.

A member shall also be certified to have earned service-credit for that period of time when he was engaged in prior employment." (Emphasis ours)

And is further defined in § 73-12-35, K, N.M.S.A., 1953 Comp. 1957 Supp., as being:

"'Earned service-credit' means that period of time during which a member was engaged in **employment** or prior employment with which he is accredited for the purpose of determining his eligibility for retirement or disability benefits." (Emphasis ours)

In turn, employment is defined at § 73-12-35 F as follows:

"'Employment' means **employment under a local administrative unit** which qualifies a person to be a member." (Emphasis ours)

See also subsection B (1) and (2), as well as G of the last cited section.

In short, the various sections of the Act contemplate earned service-credit to arise out of **New Mexico** service.

Section 73-12-73, N.M.S.A., 1953 Comp., 1957 Supp., deals with **allowed** service-credit. It provides:

"A member shall be certified to have acquired allowed service-credit for that period of time when he was:

A. Serving as a teacher or administrator prior to the effective date of the Educational Retirement Act in any federal educational program within New Mexico, including United States Indian schools and civilian conservation corp camps;

B. Engaged in military service which interrupted his employment in New Mexico, as herein defined, if he returned to such employment following honorable discharge;

C. Employed as a public school teacher or administrator or teacher or administrator in any public institution of higher learning in another state, territory or possession of the United States, or serving as provided in subsection A of this section after the effective date of the Educational Retirement Act, if the member contributes to the fund, for each year of allowed service-credit desired, a sum equal to the prevailing combined percentage of contributions of members and local administrative units applied to the member's annual salary at the time of application for such allowed service-credit. Payment under this subsection may be made in installments over a period of not to exceed one (1) year, and if the sum paid does not equal the amount required for any full year of allowed service-credit, the member shall acquire allowed service-credit for that period of time which is proportionate to the payment made.

The provisions of this section are made applicable to service, as described, prior to as well as after the effective date of the Educational Retirement Act."

See also § 73-12-35 L, N.M.S.A., 1953 Comp., 1957 Supp.

In short, certain non-New Mexico service can be considered as allowed service-credit. Here, you have stated the party in question has three years out-state service which qualifies as allowed service-credit.

We do not believe the record in question supports a claim under § 73-12-77. All would concede that Legislation like the Educational Retirement Act is to be liberally construed toward effecting its evident purpose. But the Legislature required ten years of earned service-credit in the instant case under § 73-12-77. For us to hold otherwise than as we do would be to substitute a certain amount of allowed service-credit when such was clearly not intended.

The record does not support the claim. If one is made, it should be denied.