

## Opinion No. 59-120

August 26, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

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

{\*185} This is in response to your recent request for an opinion on the following questions:

1. Can a person who was employed by the County School Superintendent of San Miguel County from July 1, 1953 to December 31, 1958, make her back payments at this time and claim credit for services under the employees' retirement system?

2. Would not all members of the County School Superintendent's office in San Miguel, who are not members of the Educational Retirement system, be required to join the association since the county is affiliated?

{\*186} The answers to your questions are:

1. Yes.

2. Yes.

The facts on which you predicate your question are that the County of San Miguel was at all material times an affiliated public employer and that during the period from July 1, 1953 to July 1, 1957, the employee was automatically a member of the Teachers' Retirement Act, and that after July 1, 1957, to the end of her employment on December 31, 1958, and under the new act (Educational Retirement Act), she elected to stay under the Educational Act. You have also stated that at no time did this employee affirmatively exempt herself from the operation of the Public Employees' Retirement Act.

Under the 1953 Educational Retirement Act, Section 73-12-16, Subsection "C", it is stated as follows:

"(c) Employees covered by this act are hereby exempted from the provisions of all other state retirement acts."

This provision was interpreted in **State v. Mechem**, 58 N.M. 495 to mean that the employee who was employed in a school system of an affiliated county, had the privilege to claim immunity from the obligations and benefits accorded to or required of employees under the Public Retirement Act, and it was not the intention of the legislature to exclude from such obligations and benefits, those employees who might elect to be covered thereunder in addition to the coverage under the Teachers'

Retirement Act. The ruling therefore is that the language quoted from Section 13-12-16 N.M.S.A., 1953 Comp., does not exempt the employee from all other retirement plans but gives him the right to participate in both.

Since the Public Employees' Retirement Act in effect in 1953 required an affirmative act on the part of an employee in order to "exempt" himself, and since the person in question has not done so, she has been, in my opinion, a member of the Public Employees' Retirement Association for the period of July 1, 1953 to July 1, 1957. Deductions should have been made from her salary and the County of San Miguel should have been contributing the matching funds. It is not necessary, in order to claim credit for this service, to pay more than her contribution which should have been deducted from her salary according to the 1953 Act.

Chapter 197, Laws of 1957, altered her position in this manner: Dual membership in the Educational Retirement Act and the Public Employees' Retirement Association was no longer possible by virtue of Section 20, which reads in part as follows:

"In the event election of exemption is not filed as herein provided, all such persons shall continue to be members under the Educational Retirement Act **and the state of New Mexico shall no longer be responsible directly or indirectly for the payment of contributions or other payment on behalf or, [of] or benefits to such persons, except as provided in the Educational Retirement Act.**" (Emphasis Supplied).

By accepting the Educational Retirement Act, the employees affirmatively exempted themselves from the Public Employees' Retirement Association. Since Section 5-5-6, N.M.S.A., 1953 Comp. PS allows an "exempt" employee to make back contributions during a period of time when they had exempted themselves, or were exempt from the operation of the Act, she would be permitted to pay her back contributions from July 1, 1957 to December 31, 1958, plus interest as provided in the above section and, if the County does not wish to pay matching contributions, she would be required to <sup>{\*187}</sup> pay this amount also in order to get service credit for that period of time.

Your second question is answered in the affirmative. Those employees who were hired by the County School system after passage of Chapter 197, Laws of 1957, and who did not hold Teachers' or Administrators' Certificates issued by the State Board of Education, could not be members of the Educational Retirement Act. The County was affiliated at that time and they would become, by operation of the law, a member of the Public Employees' Retirement system. Another classification who would have become a member of the Public Employees' Retirement Association at that time would be the "provisional member" under Section 2, Subsection "C" of Chapter 197, Laws of 1957, who did not elect to be covered under the Educational Retirement Act. Consequently, deductions should be paid by the County from July 1, 1957 to date. It is to be noted that Section 73-12-35, N.M.S.A., 1953 Comp. PS, Subsection "B" adds to this list of regular members in the Educational Retirement Act, the classification of public school nurses as being eligible under the Educational Retirement Act.

By: B. J. BAGGETT,  
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