

Opinion No. 59-124

August 27, 1959

BY: Hilario Rubio, Assistant Attorney General

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

{*192} This is in reply to a request for an opinion recently received from you on the following question:

Does subsection 4 of Section 5-5-6 or subsection 3 of Section 5-5-6, N.M.S.A., 1953 Comp. (P.S.), cover the period for Mr. Joe W. Johns of Carlsbad, New Mexico, who was retired June 1, 1951 and who returned to service with an affiliated public employer on November 16, 1953 and served until December 31, 1958, during which time his annuity was suspended, provided Mr. Johns makes the necessary contributions?

It is our opinion that Mr. Joe W. Johns' application to have his additional service credit added and his annuity recomputed is covered and permitted under authorities cited, provided Mr. Johns makes his necessary contributions.

From your letter, Joe W. Johns retired effective June 1, 1951. On November 16, 1952, Mr. Johns accepted employment with Eddy County, an affiliated public employer, and his annuity was suspended as of that date. Mr. Johns was employed from November 16, 1952 until December 31, 1958. Upon termination of his employment, his annuity was reinstated effective January 1, 1959. Now, Mr. Johns under the new law hereinafter quoted is requesting that he be allowed to pay contributions together with interest on the amounts which would have been deducted from his salary for the period of November 16, 1952 to December 31, 1958, and that matching contributions will be paid. This request is being made so that Mr. Johns may receive credit for this period of time and receive the benefits of a recomputation of his annuity.

Subparagraph 3 of Section 5-5-6, N.M.S.A., 1953 Comp. (P.S.) reads as follows:

"Exempted Persons Returned to Membership. Any employee of an affiliated public employer who has exempted himself or is exempt from membership in the association, as provided in subsections 6.1 and 6.2 of this act [section], or who exempted himself from membership or was exempt or excluded from membership under Laws 1947, chapter 167 or as amended by Laws 1949, chapter 174, may become a member by filing his written application with the retirement board.

Any employee of an affiliated public employer who exempted himself or was exempt or excluded from membership in the association may, within a period of one [1] year of the effective date of this act, enter into an agreement with the retirement board to pay into the association a sum equal to the amounts which would have been deducted had

deductions been made from his salary had he been a member, and when payment has been made in full, together with interest at the rate of four per cent [4%] compounded annually, he shall be given credit for all services rendered since August 1, 1947, or the date of affiliation of his employer; Provided that matching funds are paid into the association. Provided, however, that no employer shall be obligated to pay in matching funds for any employee entering into an agreement with the retirement board to pay the amount which would have been deducted had he been a member. In cases where the employer does not contribute these { *193 } matching funds, the employee shall contribute this amount in order to be given credit for all services rendered.

Any person who had exempted himself or was exempt or excluded from membership in the association, upon becoming a member by reentering the service of an affiliated public employer may within a period of one [1] year after first reentering service with an affiliated public employer, enter into an agreement with the retirement board to pay into the association a sum equal to the amounts which would have been deducted if deductions had been made from his salary had he been a member, and when payment has been made in full, together with interest at the rate of four per cent [4%] compounded annually, he shall be given credit for all service rendered since August 1, 1947, or the date of affiliation of his employer, provided that matching funds are paid into the association. Provided, however, that no employer shall be obligated to pay in matching funds for any employee entering into an agreement with the retirement board to pay the amount which would have been deducted had he been a member. In cases where the employer does not contribute these matching funds, the employee shall contribute this amount in order to be given credit for all services rendered."

The pertinent part of subparagraph 4 of Section 5-5-6, N.M.S.A., 1953 Comp. (P.S.) reads as follows:

". . . In the event the said person is re-employed by an affiliated public employer he shall again become a contributing member of the association, and 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 thereupon cease to be a member for so long as he shall be an annuitant; but if said person is thereafter again employed by a public employer which is or which thereafter becomes an affiliated public employer, said person shall again become a contributing member upon such employment or affiliation, whichever last occurs, for the period of such employment, for the limited purpose of acquiring additional service credit and permitting recomputation of his annuity, without change of option or election, upon termination of much [such] employment. No person who is required again to become a contributing member pursuant to this section may exempt himself from membership in the association."

In the case of **State ex rel. Hudgins, et al., v. Public Employees Retirement Board, et al.**, 58 N.M. 543, 273 P. 2d 743, the Supreme Court of New Mexico in a mandamus proceeding brought against the Public Employees Retirement Board to compel payment of annuities by several annuitants, held in favor of the annuitants in saying that the 1953 Act repealed the 1947 Retirement Act and increased benefits to public employees by permitting those employees who had annuitant status under the 1947 Retirement Act, to participate in the increased benefits providing that they elected to do so by paying an additional lump sum of money equivalent to 1 1/2% of total salary received during the last 5 years immediately preceding retirement. The Court further stated that the increased benefits do not violate the section of the Constitution {*194} prohibiting the legislature from giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract is made. Laws 1953, Chapter 162, Section 2 subd. 2.1 (6); Laws 1947, Chapter 167, Constitution, Art. IV, Section 27.

In view of the language of the amended Retirement Act herein quoted and the holding in the Hudgins Case, supra, it is our opinion that Mr. Johns' application to have his additional service credit added and his annuity recomputed is covered and permitted under the authorities cited, provided Mr. Johns makes the required contributions.