

## Opinion No. 60-07

January 20, 1960

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

**TO:** Mr. Kenneth A. Davis Director Educational Retirement Board Santa Fe, New Mexico

### QUESTION

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Is an individual previously retired under the Educational Retirement Act, who, thereafter, re-enters employment in the Public School Finance of the Department of Finance and Administration, eligible to continue to receive retirement benefits?

#### CONCLUSION

No.

### OPINION

#### {\*341} ANALYSIS

Section 73-12-67, N.M.S.A., 1953 Compilation, P. S. reads in part as follows:

". . . No member shall be on retirement status while he is engaged in employment as defined herein. . . ."

"Employment" is defined in the Act as employment with a department which is a member of the educational retirement system.

It has generally been held that public re-employment is a bar to receiving a public pension. This is especially true when the person re-enters employment with the same unit or system from which he retired and that system's pension plan has an express or implied prohibition against drawing such a pension while being employed with that unit or system. See **State ex rel Bernal v. Foraker**, 64 N.M. 71; **Turner v. Passaic**, 10 N. J. Misc. Rep. 1270; 163 Atl. 388; **Cox v. McElligott**, 163 Misc. 619, 298 N.Y. Supp. 805; **Griebel v. Firemens' Pension Fund**, 105 Pa. Super. Ct. 510, 161 Atl. 588; and generally 162 A.L.R. 1469 at 1472.

It should be noted from the above quoted section that the Educational Retirement Act contains such a prohibition.

The question now to be resolved is whether the director of public school finance division of the department of finance and administration is a part of the educational system. The one certain test of this is to determine whether employees of that division obtain their salaries and other funds from the public school equalization fund or whether their salaries are paid from funds appropriated from the general fund of the state. Chapter 288, Laws 1959 at page 830 sets forth the budget for the public school division and immediately thereafter provides:

{\*342} "Provided, that the appropriation for the public school finance division is made from the public school equalization fund."

The above quoted portion of the appropriations act provides the answer to this question. It is clear from this proviso that all funds appropriated for the public school finance division are school funds from the public school equalization fund.

The result therefore is clear. The director of the public school finance division being an employee of the educational system by virtue of receiving his salary from funds provided from the public school equalization fund cannot receive a pension or benefit under the educational retirement system so long as he continues his employment in that position. It should be noted that this does not revoke the retirement benefit but rather merely suspends it until the person is no longer employed as director of the public school finance division.

By: Boston E. Witt

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