

Opinion No. 60-217

December 8, 1960

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

TO: Mr. R. M. Duncan Member, Educational Retirement Board Department of Modern and Classical Languages Joaquin Ortega Hall University of New Mexico Albuquerque, New Mexico

QUESTION

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Does a faculty member of a state educational institution, who is eligible to retire under the Educational Retirement Act, lose his retirement rights if he is discharged from school employment?

CONCLUSION

No.

OPINION

{*636} ANALYSIS

Faculty members of the University of New Mexico are eligible to retire under the Educational Retirement Act as regular members. Section 73-12-35, N.M.S.A., 1953 Compilation (P.S.). You base your question upon the assumption that the faculty member in question has completed all the requirements for retirement. We assume, therefore, for the purposes of this opinion that the faculty member has met all the requirements of § 73-12-66 or 67, N.M.S.A., 1953 Compilation (P.S.), as regards earned service credit and age.

As a general rule, public employees are not entitled to pensions or gratuities as a matter of right; however, allowances paid to public employees from retirement funds, maintained in part by the employees, are not normally thought to be pensions nor gratuities, but rather are given in consideration of services which are not fully compensated when performed. **Talbott v. Independent School Dist. of Des Moines**, 230 Iowa 949, 299 N.W. 556. They are in this respect thought of as retirement "pay". Retirement pay or allowances constitute a part of an employee's compensation. **Schieffelin v. Berry**, 216 N.Y.S. 367, 217 App. Div. 451. Public employees normally acquire a vested right in these allowances; however, there is certainly no unanimity of opinion among the courts as to the time at which the right becomes vested. Courts generally hold that such an employee does not acquire a vested right in these allowances prior to the happening of the events or contingency upon which payments

are to be made. **Green v. West**, 62 Ga. App. 584, 9 S.E. 2d 102; **Retirement Boards of Allegheny v. McGovern**, 316 Pa. 161, 174 A. 400.

We turn now to your specific question. Under the authorities outlined above, we are of the opinion that benefits under the Educational Retirement Act of this state are retirement allowances and not mere gratuities inasmuch as the employees themselves maintain in part the fund. We are further of the opinion that when an employee, {*637} in this instance a faculty member, meets all of the requirements for retirement -- that is to say, when the contingency occurs on which payments are to be made -- he or she acquires a vested right in his retirement benefits under the act and any subsequent discharge or other happenings cannot defeat this right.

By: Boston E. Witt

Assistant Attorney General