

Opinion No. 62-118

September 25, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

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

QUESTION

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Is a professor employed at the University of New Mexico, now applying for retirement benefits, entitled to receive allowed service-credit for his previous out of state service at the Carnegie Institution in Washington, D.C., during the period 1931 to 1936?

CONCLUSION

No.

OPINION

ANALYSIS

In answer to your question we find it necessary to refer to certain statutory provisions and make factual determinations. The most significant statutory provision involved herein is that portion of the Educational Retirement Act compiled as Section 73-12-73, N.M.S.A., 1953 Compilation (P.S.) which provides in part as follows:

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

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 . . . 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. . ."
(Emphasis supplied)

In order that a retiring member be able to receive credit for out of state employment the statute explicitly requires that he shall have been employed as a teacher or administrator in either the public schools or a public institution of higher learning. We are advised that the Carnegie Institution is a privately endowed educational research organization that does not maintain a teaching faculty. We also understand that the

institution does not have a student body. Presumably the professor in question was engaged in research during the time that he was associated with the institution. Assuming that the stated facts are true, it appears abundantly clear that the subject professor was not employed as an "administrator or teacher" during the critical period of time. In view of this circumstance, and other matters hereinafter considered, it is unnecessary for us to decide whether the Carnegie Institution is a "public institution of higher learning" within the meaning of the statute.

Even though we have decided that the type of employment described does not entitle the subject individual to allowed service credit, as provided in the quoted statute, it is still necessary to consider the possible application of statutory provisions which were in effect until repealed by the Educational Retirement Act in 1957. A saving clause in the present law (§ 72-12-63, N.M.S.A., 1953 Compilation (P.S.)) provides that:

"No member who was heretofore covered under the provisions of any statute repealed by the Educational Retirement Act shall be retired at a **monthly benefit which is less than he would have received had his employment continued to be performed under such repealed provisions.**" (Emphasis supplied)

It has been suggested that the above saving clause entitles the retiring employee to the benefit of service-credit provisions of Section 33-12-16 (a) of the former law. Said section provided that retirement credit would be given for "educational service in other states . . . prior to serving in New Mexico." The advocates of this view contend that the term "educational service" is broad enough to include the type of service performed by the retiring professor at the Carnegie Institution and that he should receive allowed service-credit for the time he was so employed. We cannot concur in this interpretation. In our view, the only thing that the quoted saving clause does is to guarantee to the retiring employee that he shall not receive less retirement benefits than he would have received under the former law. In this regard, we are advised by your office that the subject individual will receive greater retirement benefits under the present law than the maximum amount he could have received if his employment had continued to be performed under the repealed statutes, regardless of whether the Carnegie Institution service were included.

We have determined that the member is not entitled under Section 73-12-73 C to receive allowed service-credit for the time he was employed by the Carnegie Institution because he was not employed as a "teacher or administrator." We are advised that as a matter of factual certainty he will receive greater benefits under the Educational Retirement Act than he would have received under former law. He is, therefore, not entitled, by reason of the saving clause, to receive credit for the described out of state employment.