

Opinion No. 63-152

November 8, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

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May a local school board retire a tenure teacher solely because of the teacher's age, and if so, at what age may such retirement for age purposes be effected?

CONCLUSION

Yes, but only after the tenure teacher has attained the age of 62 years.

OPINION

{*353} ANALYSIS

Three legislative provisions have specific application to the question here presented. Section 73-12-66, N.M.S.A., 1953 Compilation, contained in the Educational Retirement Act provides as follows:

"A member shall be eligible for retirement benefits, computed under § 73-12-60, New Mexico Statutes Annotated, 1953 Compilation, as amended, when he has acquired fifteen or more years of earned service credit and has attained the age of sixty years. A member under sixty years of age who has acquired thirty or more years of earned and allowed service-credit may retire and receive the actuarial {*354} equivalent of the retirement benefits, provided for in Section 73-12-60, New Mexico Statutes Annotated, as amended, that he would be eligible to receive if he were to retire at the age of sixty years."

Section 73-12-68, N.M.S.A., 1953 Compilation permits local school boards to make application for the retirement of a local teacher upon the teacher attaining the age of sixty years. This section sets out:

"Applications for retirement shall be made by the member upon a form provided by the board. **In the case of members who have attained the age of sixty years, application may be made for their retirement by the local administrative unit.**"
(Emphasis supplied)

The above statute was enacted by the state legislature by Laws 1957, Chapter 197, Section 35. In Attorney General's Opinion No. 58-123, dated June 12, 1958, it was previously held by this office that when a tenure teacher reaches sixty years of age and is otherwise eligible to retire, but does not desire to, his local administrative unit may apply for his retirement.

The 1963 legislature amended Section 73-12-13, N.M.S.A., 1953 Compilation, to extend teachers tenure coverage from age sixty to age sixty-two. Section 73-12-13, states in applicable part:

"G. This section shall not apply to:

...

(3) **Otherwise qualified personnel who have attained their sixty-second birthdate** prior to the last day of the school year.

... ." (Emphasis supplied)

From a comparison of the above statutes, it is evident the legislature has specifically provided that a teacher who has obtained tenure may not be removed or discharged from employment without cause, until attaining the age of sixty-two. Section 73-12-68, however, states that local boards of education may make application for the retirement of persons who have reached the age of sixty.

Immediately it may be seen that an apparent conflict exists between the provisions of the two statutes. Under the tenure act, teaching personnel are protected from involuntary dismissal from service without being afforded notice of dismissal indicating a statement of the cause for discharge upon which the governing board has founded its decision to terminate. In addition, the tenure statutes provide a covered teacher with the opportunity for hearing and review upon the dismissal charge. The design and purpose of the statute is to prevent teachers who have acquired tenure status from arbitrary dismissal without justifiable cause, public hearing, and an opportunity to refute such charges.

Section 73-12-68 of the Educational Retirement Act allows the involuntary retirement of teachers by local school boards because of age. Because of the 1963 amendment (Chapter 205, Laws 1963, Section 1) to the tenure act raising the maximum age limit for tenure teachers to age 62, it is our opinion that this enactment insofar as tenure teachers are concerned, effected a repeal by implication of the provisions of Section 73-12-68 (Educational Retirement Act) pertaining to the age at which a school board may involuntarily retire a teacher having tenure status. **Stokes v. New Mexico State Bd. of Ed.** (1951) 55 N.M. 213, 230 P.2d. 243; **State v. Valdez** (1955) 59 N.M. 112, 279 P.2d. 868.

{*355} We conclude that if a teacher has obtained tenure such teacher may not be retired involuntarily by application of the local school board because of age purposes until the teacher has reached the age of 62. In our opinion a contrary interpretation would completely nullify the 1963 legislative amendment extending the maximum age of tenure teachers from 60 to 62, since the protection afforded teachers by the extension of the tenure act would be virtually meaningless after they attained age 60.

The teacher tenure act, as recognized in **Board of Education of City of Las Vegas v. Boarman** (1948) 52 N.M. 382, 189 P.2d. 998, is remedial in its nature. As stated in **Hensley v. State Board of Education** (1962) 71 N.M. 182, 376 P.2d. 968, the purpose of the tenure act is to retain experienced school personnel. In the Hensley case, the court quoted with approval the case of **Stapleton v. Huff**, (1946) 50 N.M. 208, 173 P.2d. 612, which stated:

"The legislature has recognized the sound public policy of retaining in the public school system teachers who have become increasingly valuable by reason of their experience and has, by statute, assured these public servants an indefinite tenure of position during satisfactory performance of their duties. *Ortega et al. v. Otero*, 48 N.M. 588, 154 P.2d. 252."

In accord with the statement of public policy stated above, it is our opinion that since the provisions of the teacher's tenure act, as amended, are remedial in nature, such legislation should be liberally interpreted in order to effect its manifest purpose. As stated in 82 C.J.S., "Statutes", Section 388, at page 919: "In construing remedial statutes, regard should be had to the former law, the defects or evils to be cured or abolished, or the mischief to be remedied, and the remedy provided; and they should be interpreted liberally to embrace all cases fairly within their scope so as to accomplish the object of the legislature, and to effectuate the purpose of the statute. . ."

The distinction should be noted that the provisions of Section 73-12-68, regarding the authority of local school boards to retire contract teachers solely for age purposes at age 60 is applicable to non-tenure teachers, but insofar as tenure teachers are concerned, the provisions of Section 73-12-13, N.M.S.A., are controlling and such personnel may not be retired involuntarily for age purposes until they reach their 62nd birthdate.

By: Thomas A. Donnelly

Assistant Attorney General