

Opinion No. 63-34

April 17, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

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Is Educational Retirement Board Resolution No. 69, providing a determination of what constitutes salary within the meaning of Sections 73-12-57 and 73-12-58 N.M.S.A., 1953 Compilation (P.S.), a legal and valid act of the Board?

CONCLUSION

Yes.

OPINION

{*72} ANALYSIS

You have asked that we examine your Board's Resolution No. 69 in light of Public Law 87-370 passed by Congress in 1961, which provides an income tax exemption in connection with annuities purchased for public school teachers. Some question has been raised as to the authority of the Board to determine what constitutes salary within the meaning of Sections 73-12-57 and 58.

If our understanding is correct, the problem created by the new Act of Congress is that in order for employees of educational institutions in the state to receive the annuity benefits provided, the employer must pay the annuity premiums. Since the state school systems are not in a position to provide this additional benefit, it has been the practice for employees desiring to take advantage of the annuity to voluntarily request and accept a salary reduction to the extent necessary to permit the employer to pay the annuity premiums. This rather unusual voluntary salary reduction has created a problem in the administration of the Educational Retirement Act. It is our understanding that the Board is anxious to determine whether the mentioned "salary reduction" will of necessity require a reduction in the employer's and employee's contribution under the Educational Retirement Act.

Fully realizing that you are familiar with it, we set out the text of Board Resolution 69 in order that it may be examined with regard to this problem:

"69. Resolved that the member and administrative unit contributions required by Sections 73-12-57 and 58, N.M.S.A., 1953 Compilation, as amended, shall be based on the member's total regular remuneration for personal services rendered regardless of whether all such remuneration shall be paid directly to the member or to a third party on behalf of or for the benefit of the member."

It is apparent that the above resolution was adopted by the Board in an effort to protect the fund and to assure the continued actuarial soundness of the retirement system. For reasons that we will set out below, we feel that the action of the Board was not only justified on grounds of practicality and necessity, but was also a legitimate exercise of the {*73} Board's powers.

It is apparent at several points in the Educational Retirement Act that the Board is expected to adopt rules, regulations and resolutions necessary to the implementation of their statutory powers. A casual review of the statute reveals the following examples:

Section 73-12-35 B (3) contains authorization for the promulgation of the rules and regulations for the classification of members. Sections 73-12-41 and 42 provide for additional powers and duties being given to the Director pursuant to rule and provide for the establishment of certain forms pursuant to rules and regulations of the Board. Section 72-12-52 provides for the exemption of provisional members to be accepted according to methods set out by rules and regulations to be promulgated by the Educational Retirement Board.

It is clearly necessary that in the administration of a complex retirement system, rules and regulations must be adopted to facilitate the operation of the system. It would indeed be unwise to attempt to provide all guide lines by means of statute. Certainly the Board may not modify or change the statute by means of rules and regulations. It is however, within its power to adopt rules and regulations, the purpose of which is to clarify and implement the purpose of the statute. It is for this reason that we conclude that Resolution No. 69 constitutes a valid and binding act of the Board.

It appears clear to me that the said resolution is consistent with the statute. The statute does not provide a definition of the word "salary", and in order to effectively administer the Act in regard to the particular problem raised by the mentioned annuity, it is necessary that some guide lines be established in order that the meaning of salary or remuneration can be determined in specific cases. The case now concerning the Board involves a situation very similar to payroll deductions for purposes of paying insurance premiums. The only difference is that in order to satisfy the requirement of Federal law the individual's salary is reduced and the premium payment is made directly by the administrative unit. The amount of the premium is clearly a part of the member's regular pay. In fact, the member may drop out of the annuity program at any time and demand that the voluntary salary reduction be restored to him. The crucial factor is that the amount of money involved in the salary reduction is disposed of according to the independent wishes and instructions of the member. It is, therefore, consistent with common sense and general understanding to conclude that this money should be

included as part of regular remuneration for purposes of computing contributions required by Section 73-12-57 and 58.

By: F. Harlan Flint

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