

## **Opinion No. 64-08**

January 27, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General James E. Snead, Assistant Attorney General

**TO:** John C. Hays, Executive Secretary, Public Employees' Retirement Association, Don Gaspar, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. Does the Public Employees Retirement Board have authority to charge a lesser rate of interest payment for one employee for contributing service credits under Section 5-5-7.1, N.M.S.A., 1953 Compilation, than it charges to other employees?
2. What is the period for computing interest due for such payments?
3. Must interest payments be made by the employee for contributions representing those of the employer to obtain back contributing service credits under Section 5-5-7.1, supra?

#### CONCLUSIONS

1. No.
2. Interest must be paid until the time of repayment.
3. No.

### **OPINION**

#### ANALYSIS

Section 5-5-7.1, N.M.S.A., 1953 Compilation provides as follows:

"5-5-7.1. Contributing service credit. -- Members who were or are employees paid by the United States from funds allocated to the national guard of this state may, within one (1) year from the effective date of this enactment, apply and obtain credit for contributing service for any period of such employment subsequent to August 1, 1947, by paying under such terms as the board may prescribe all sums that would have been contributed by them as a member for the period of service for which contributing service credit is sought, together with regular interest, as determined by the board to be due, based upon the time the contributions would have been paid, and by paying, under such

terms as the board may prescribe, all sums that would have been contributed by their employer for the period of service for which contributing service credit is sought."

Under this section, the first question requires a determination of the rate of interest to be charged employees who desire to pay into the retirement fund moneys for a period of time they were employed by the state, but did not acquire contributing service credit for the simple reason that they did not contribute. It is obvious that such an employee must first pay into the fund such moneys as would have been paid both by him and his employer had they contributed at the time the money was earned. The primary consideration of the first question is what the rate of interest shall be, and whether it can be different for one person than another. This requires a determination of what the term "regular interest" means when used in the quoted statutory section. Section 5-5-1 (R), N.M.S.A., 1953 Compilation provides the definition of "regular interest" under which this opinion must operate. This definition is as follows:

"R. 'Regular interest' shall be such rate or rates of interest, compounded annually, as the retirement board shall from time to time determine; Provided, that such rate or rates of interest shall be a multiple of one-quarter of one percent (1/4%), and shall not be less than one per cent (1%) per annum, nor more than four per cent (4%) per annum, compounded annually."

It is obvious from this section that it is the duty of the Board to set interest rates for moneys paid into the fund. We are informed that as of the present time the rate charged those who presently wish to contribute back funds is four (4%) percent. The question posed is whether the board can now set the rate at one (1%) percent for a single individual while leaving it at four (4%) percent for everyone else. When the question is posed in this manner the answer becomes obvious. Such a discrimination between contributors would be arbitrary and unconstitutional, and we can visualize no fact situation where such a discrimination would be justified. The Board is authorized to set interest rates, but once they are set they must be applied to everyone within the class equally. Those who had repaid their retirement contributions during the period in question would be quite justified in complaining that they had been required to pay four (4%) percent whereas another employee was required to pay only one (1%) percent.

The second question asks what the period for computation of interest would be for contributions paid under section 5-5-7.1, supra. The answer is that the period runs from the time the payments would originally have been made until the time of repayment. Such is the only logical time period. If the moneys had been paid at the time the wages were earned, they would draw interest from shortly thereafter. However, in a situation where the employee has the use of the money for a period of time and thereafter desires to pay it into the fund to achieve retirement benefit, he has had the opportunity of the benefit of the interest instead of the members of the Public Employees' Retirement Association. Those members who have paid their money into the fund when the wages were earned, and who have been deprived of the use of the money from that time forward have a right to demand that a member making retroactive payments include in those payments all of the interest lost to them. This, of course, includes all of

the interest until the money is paid into the fund. In the absence of any statutory language to the contrary, this is the only logical result. This interpretation is supported by Section 5-5-6 (4), N.M.S.A., 1953 Compilation relating to repayments by members who withdrew their money from the fund upon leaving the association, and upon returning to the association desire to repay such money. This section requires the returning member to return the money together with the interest **from the time of withdrawal to the time of repayment.** It is, therefore, our opinion that any repayment or initial payment under Section 5-5-7.1 must include interest from the time the money is due until the time it is repaid or initially paid.

The last question is answered simply by reference to the statute. Both this section, and Section 5-5-6, supra, require first that the employee's contribution be repaid **with interest**, "and that the employer contributions be paid." It is obvious that it was the intent of the Legislature that the employee who desires to reestablish his right to retirement act benefits has only to pay the interest on the money he would have contributed, and not pay interest on that money his employer would have contributed. Such is our opinion.