Opinion No. 66-87

July 8, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. John C. Hays, Executive-Secretary, Public Employees' Retirement Board, 113 Washington Avenue, Santa Fe, New Mexico

QUESTION

QUESTION

When an employee of an affiliated public employer seeks contributing service credit for services rendered after August 1, 1947, and prior to the effective date of his membership, are employer (as well as employee) contributions to be paid, and if so, by whom?

CONCLUSION

Yes, by either the employer or the employee.

OPINION

*{*115}* ANALYSIS

Section 5-5-6, N.M.S.A., 1953 Compilation, as amended in 1963, provides that "contributing service credit after August 1, 1947, and prior to the effective date of his membership shall be granted provided such member enters into an agreement with the retirement board on or before August 1, 1966, to pay contributions on all service rendered to the state or a municipality after August 1, 1947, together with interest at the rate of four per cent compounded annually. . . ."

In addition, Section 5-5-6, supra, provides that "employer contributions be paid." Prior to the 1963 rewrite of this entire Section it stated as follows:

"Provided, however, that no employer shall be obligated to pay in matching funds for any employee entering into an agreement with the retirement board to pay the amount which would have been deducted had he been a member. In cases where the employer does not contribute these matching funds, the employee shall contribute this amount in order to be given credit for all services rendered."

We do not believe the 1963 rewrite of Section 5-5-6, supra, was intended to make any substantive change in the area of matching contributions. And the Retirement Board in administrative practice has viewed the matter in this light.

It is clear that the legislature never intended to **require** that the affiliated public employer pay the matching contributions here in question. In many cases no funds have been budgeted for such purpose, and, in fact, it is possible that no funds will be available. It seems equally clear that the legislature did not intend to **prohibit** the payment of these matching funds by the affiliated employer. Had it so intended, it would have been a quite simple matter so to state.

It is our opinion that the payment of the matching funds here in question by the affiliated public employer does not violate Sections 27 and 31 of Article 4 or Section 14 or Article IX of our state constitution. While not *{*116}* dealing with an identical situation, there is much language in **State v. Public Employees Retirement Board,** 58 N.M. 543, 273 P.2d 743 that supports us in this view.

We conclude, therefore that the affiliated public employer still has an option on the payment of the type of matching funds here in question. If the employer does not do so, the employee seeking this particular service credit must pay both the employee contributions plus interest as well as the matching employer's share (without interest).