

Opinion No. 69-38

May 2, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General James V. Noble, Assistant Attorney General

TO: Leonard T. Valdes, Executive Secretary, Public Employees' Retirement Association, P.E.R.A. Building, Santa Fe, New Mexico 87501

QUESTIONS

QUESTIONS

1. Is Chapter 233, Laws of 1969, constitutional in the sense that although an annuitant may return to work with an affiliated county or municipal government without suspension of his annuity, the same annuitant may not do so with any other affiliated public employer?

2. As Section 5-5-13.1, N.M.S.A., 1953 Comp. (P.S.) "State Police Members" was not specifically repealed or amended by Chapter 233, supra, is a state policeman who retires still limited to return to employment with a municipal law enforcement agency without suspension of his annuity?

3. Chapter 233, supra, purports to make an exception to the provisions of Section 5-5-13, N.M.S.A., 1953 Compilation (P.S.). However, Section 5-5-6(4), N.M.S.A., 1953 Comp. (P.S.) is not mentioned in Chapter 233, supra, and reads:

"Except as otherwise provided, should any member separate from the services of an affiliated public employer, for reasons other than becoming an annuitant, he shall thereupon cease to be a member, and the total service credited to him, at the date of his said separation from service, shall be forfeited by him. In the event the said person is re-employed by an affiliated public employer he shall again become a contributing member of the association, and the total service forfeited by him, at the time of his said last separation from service, shall be restored to his credit; Provided, that the said member returns to the employees' savings fund the full amount of accumulated deductions he may have previously withdrawn therefrom, together with regular interest computed from the date of withdrawal to the date or dates of repayment. In the event a member becomes an annuitant, by reason of his retirement, he shall thereupon cease to be a member for so long as he shall be an annuitant; but if said person is thereafter again employed by a public employer which is or which thereafter becomes an affiliated public employer, said person shall again become a contributing member upon such employment or affiliation, whichever last occurs, for the period of such employment for the limited purpose of acquiring additional service credit and permitting recomputation of his annuity, without change of option or election, upon termination of such employment.

no person who is required again to become a contributing member pursuant to this section may exempt himself from membership in the association."

Is Section 5-5-6(4), supra, affected by passage of Chapter 233, supra?

4. Under present law the purpose of an annuitant returning to work is for the sole purpose of acquiring additional service credit and permitting recomputation of his annuity under the law in effect at the time he first retired. This usually results in an increase in annuity. Wouldn't Chapter 233, supra, penalize that employee who desires to increase his benefits by virtue of his having returned to employment for this purpose?

5. Is the Public Employees' Retirement Board required to recompute for all suspended retirees who are presently employed with a municipal or county government and restore to them their annuity payment, while at the same time leaving on suspension those working with other affiliated public employers?

CONCLUSIONS

1. Yes, but see analysis.

2. No.

3. Section 5-5-6(4), N.M.S.A., 1953 Comp. (P.S.) is considered amended by implication. See analysis.

4. Yes.

5. Yes, see analysis.

OPINION

{*58} ANALYSIS

The first question concerns the constitutionality of the Act herein referred to as Chapter 233, supra. It purports to create a class of public annuitants who are employed by municipalities and who are affiliated public employees under the Public Employees' Retirement Act. This class of annuitants may receive salaries as compensation as well as receiving their annuity. They may not receive additional service credit.

The class of public annuitants who accept employment with an affiliated employer **other than** such municipal and county governments **will have** their annuities suspended during such employment. They do receive service credit.

Some problem is created by the language of Chapter 233, supra, when compared with the language of Sections 5-5-1, et seq., N.M.S.A., 1953 Compilation. Such ambiguity and lack of clarity is not such as to be a constitutional problem.

The first consideration is whether an unreasonable classification is created by Chapter 233, *supra*, in violation of Article II, Section 18 of our Constitution and whether it constitutes special legislation against the prohibition of Article IV, Section 24 of our Constitution.

We note that this office does not declare statutes unconstitutional unless such defeat is clear.

On numerous occasions our courts have passed on the application of these constitutional provisions. The decisions all commence with the presumption of constitutionality of legislation and the presumption that the legislature has some reasonable basis in mind in establishing a classification. Classification is not bad so long as it is not unreasonable and arbitrary and so long as all objects within the class are treated equally. Similarly under the same circumstances special legislation is not constitutionally bad.

Among the cases discussing the application of these constitutional provisions are **Burch v. Foy**, 62 N.M. 219, 308 P.2d 199 (1957); **{*59} Community Public Service Co. v. The New Mexico Public Service Commission et al.**, 76 N.M. 314, 414 P.2d 675 (1966); **Romero v. Tilton**, 78 N.M. 696, 437 P.2d 157 (C.A. 1967); and, **Cortez v. Martinez**, 79 N.M. 506, 445 P.2d 383 (1968) which expressly approved **Romero v. Tilton**, *supra*.

In some of these cases the court found no reasonable basis for classification and, consequently found forbidden unequal application of the law. In others the court found a reasonable basis for classification and consequently held the laws being considered as constitutional.

It can be seen that the employment by an affiliated municipal or county government will often or usually involve the same general types of duty as would be rendered to another affiliated public employer. Re-employment by an affiliated municipal or county government would not result in suspension of retirement annuities while re-employment by any other affiliated public employer would result in such suspension. The only basis for the distinction appears to be that of the employer classification although all are **affiliated public employers** and although, under the definition of Sections 5-5-1 and 5-5-5, *supra*, only some municipalities are included in the new classification for the purpose of Chapter 233, *supra*.

We have reservations as to the constitutionality of Chapter 233, *supra*, but are not prepared to state that it is **clearly** unconstitutional. In addition to what has been considered above there appears to be other constitutional problems.

Next you ask if, in view of Chapter 233, *supra*, a retired state policeman under the provisions of Section 5-5-13-1, N.M.S.A., 1953 Comp. (P.S.) would be limited to employment with a municipal law enforcement agency and in order to also receive his annuity payments. Although Chapter 233, *supra*, does not directly amend Section 5-5-

13.1, N.M.S.A., 1953 Comp. (P.S.) it necessarily has the effect of allowing a retired state policeman to take employment in any capacity with a county or municipal government, without having his annuity suspended. He would enjoy the same limited rights as any other public employee retired under the public employees' retirement law.

We do not pass, and have not previously passed, on the constitutionality of Section 5-5-13-1, supra.

You ask the effect of Chapter 233, supra, on Section 5-5-6(4), N.M.S.A., 1953 Comp. (P.S.). That section provides in substance that an annuitant cannot also be a member of the Public Employees' Retirement Plan but must, in lieu thereof, become a member. His annuity is then suspended under Section 5-5-13, N.M.S.A., 1953 Compilation. He does, in such case gain additional service credit.

Chapter 233, supra, provides that he may be an annuitant and at the same time be a member of P.E.R.A. as an employee of **certain specified affiliated public employers**. It further provides that in such case he shall not receive additional service credit. Since the provisions of Chapter 233, supra, and Section 5-5-6(4), supra, are contradictory, the language of the legislation last passed would control. Section 5-5-6(4), supra, is considered as amended to the extent required by the language of the later enactment of Chapter 233, supra. **State v. Chavez**, 77 N.M. 79, 419 P.2d 456 (1966). An annuitant employed by a county or municipal government may be a member of P.E.R.A. An annuitant employed by **any other** affiliated public employer may not be a member of P.E.R.A. He loses his annuitant status and regains his membership status.

Your next question has been answered by what has been heretofore said.

Your final question is answered in the affirmative. There would ^{*60} have to be a recomputation as of the effective date of the Act and payment of annuities commenced, based thereon, to all employees of municipal and county governments whose annuities had previously been suspended by reason of such employment.