

Opinion No. 71-66

May 6, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mrs. Rose Marie Alderete Clerk Supreme Court of New Mexico Supreme Court Building Santa Fe, N. M. 87501

QUESTIONS

FACTS

A judge began making deductions January 1, 1955 and withdrew 80% of the accumulated contributions on July 30, 1962, and continues on the bench with no break in service as a judge or justice. He now wishes to withdraw the remaining 20%, or use it as a credit to reenter the program.

QUESTIONS

Can the accumulated contributions of judge or justice under the Judicial Retirement Act be withdrawn while remaining on the bench?

CONCLUSION

No.

OPINION

{*97} ANALYSIS

Section 5-5-27, N.M.S.A., 1953 Comp. which was the applicable statute at the time of the withdrawal of the accumulated contributions in 1962 provided:

"Should any person, who has served as a judge of the district court or justice of the Supreme Court, or both combined, die, resign or cease to be a judge or justice of either of said courts, prior to the time he shall have retired as provided herein, eighty percent (80%) of the amount of his accumulative contribution shall be paid to his beneficiary nominated by written designation duly filed with the secretary of state, or to him, as the case may be."

{*98} Section 5-5-27, N.M.S.A., 1953 Comp. (P.S.) provides:

"Judicial Retirement Act -- Refund of contributions. -- Should any person who has served as a judge of the district court or court of appeals or justice of the Supreme Court, or any combination, die, resign or cease to be a judge or justice of one of these

courts prior to the time he retires or becomes eligible for retirement and neither he nor his widow are eligible for benefits under the Judicial Retirement Act [5-5-24 to 5-5-28.1], the amount of his accumulated contribution shall, at his request or the request of his beneficiary in case of his death, be paid to him or to his beneficiary nominated by written designation filed with the secretary of state."

The only manner in which a judge or justice may withdraw his accumulated contributions under the provisions of the Judicial Retirement Act is to die, resign or cease to be a judge. Under Section 5-5-26, N.M.S.A., 1953 Comp. a judge may waive the benefits of the Act by expressly filing a waiver with the Department of Finance and Administration. This waiver does not provide for any withdrawal of accumulated contributions.

The withdrawal of accumulated contributions in 1962 was without statutory authority, though apparently the withdrawal of the judge from the judges retirement plan was in compliance with Section 5-5-26, **supra**. It is the opinion of this office that those funds must be repaid to the fund, with interest, to form a corpus of contributions to be maintained along with the 20% left in the fund in 1962, under the provisions of 5-5-27, **supra**. The 20% which remained in the fund ostensibly reverted to the fund, just as if the judge had died and the 80% of accumulated contributions had been paid to his widow.

The aforesaid will affect any judge or justice who may have withdrawn a percentage of his accumulated contributions from the fund not in compliance with the requirements of Section 5-5-27, *supra*.

By: Jay F. Rosenthal

Assistant Attorney General