Opinion No. 72-41

September 1, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Jay F. Rosenthal, Assistant Attorney General

TO: Mr. Leonard Valdes, Director Public Employees, Retirement Association, P.E.R.A. Building, Santa Fe, New Mexico 87501

QUESTIONS

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(1) Is prior service credit to be given by the Public Employees Retirement Board for service rendered prior to August 1, 1947 to a state educational institution?

(2) Is contributing service credit to be given by the Public Employees' Retirement Board for service rendered to a state educational institution between August 1, 1947 (the effective date of the Public Employees' Retirement Act) and July 1, 1957 (the effective date of the Educational Retirement Act)?

(3) Is prior service credit to be given by the Public Employees' Retirement Board for service rendered to the public schools prior to August 1, 1947?

CONCLUSIONS

(1) Yes.

(2) Yes, so long as the employer's contribution is paid as well as the employee's contribution with appropriate interest.

(3) Yes.

OPINION

*{*68}* ANALYSIS

Our inquiry must commence with an analysis of certain 1971 amendments to the Public Employment Retirement Act. After the amendment of Section 5-5-1 N, N.M.S.A., 1953 Comp. (P.S.), it reads as follows (the amendatory language is underlined):

"N. 'prior service' means service rendered prior to August 1, 1947, as an employee of any public employer **including state educational institutions."** (Emphasis added)

Section 5-5-1 E was also amended in 1971 to add the language underlined below:

"E. 'public employer' means the state of New Mexico or any municipality in the state **excluding any agency or institution and the like eligible under the Educational Retirement Act."** (Emphasis added)

At first glance it might appear that subsection N conflicts with subsection E since state educational institutions are eligible under the Educational Retirement Act. This is not the case, however, because to so construe the amendatory provisions would render the language in subsection N "including state educational institutions" mere surplusage. A basic rule of statutory construction is that such intention is not to be attributed to the legislature. Statutes are to be construed so as to give effect to all their provisions and not render any portion surplusage or superfluous. **Cromer v. J. W. Jones Construction Co.,** 79 N.M. 179, 441 P.2d; **Martinez v. Research Park, Inc.;** 75 N.M. 672, 410 P.2d 200; **Trujillo v. Romero,** 82 N.M. 301, 481 P.2d 89. The last paragraph of Opinion of the Attorney General 70-103 was written prior to the 1971 amendment of subsection N, of Section 5-5-1, **supra,** and since it no longer reflects existing law it is expressly overruled.

Your second question involves the same statutory provisions discussed above. There is no language in any of the provisions that specifically deals with the August 1, 1947 to July 1, 1957 period. But this time period, just like the pre-August 1, 1947 period, was prior to enactment of the Educational Retirement Act. There is no rational basis for treating this period of service any differently from service rendered prior to 1947 for purposes of P.E.R.A; service credit - other than that the 1947-1957 period must be contributing. To treat the periods differently would raise serious constitutional objections to the 1971 amendments. Classification for purposes of legislation must be based *{*69}* on substantial distinctions. **State v. Pate,** 47 N.M. 182, 138 P.2d 1006. Classification under a law, in order to be legal, must be rational, it must be founded upon real differences of situation or condition which bear a just and proper relation to the attempted classification and reasonably justify a different rule. **Burch v. Foy,** 62 N.M. 219, 308 P.2d 199. As we said, the legislation in question does not mention the 1947 to 1957 period so we have no unreasonable classification, and thus no constitutional problem, as long as, from a P.E.R.A. service credit standpoint, we treat all service for a state educational institution prior to July 1, 1957, the effective date of the Educational Retirement Act, the same. To do otherwise would also be to attribute an unreasonable and unjust intention to the legislature. This the courts do not do. **Bettini v. City of Las Cruces,** 82 N.M. 633, 485 P.2d 967; **McDonald v. Lambert,** 43 N.M. 27, 85 P.2d 78. It would surely be unreasonable and irrational to assume that the legislature intended to grant free service credit for state educational institution employment prior to August 1, 1947 and not grant such service credit for the 1947-57 period for which all contributions - employer and employee - would be paid.

In view of the preceding analysis it becomes necessary to point out what was intended by the 1971 amendment to subsection E of Section 5-5-1, **supra.** Prior to the amendment a very legitimate argument could be made **that even after** the date of the Educational Retirement Act, Public Employee Retirement Association credit could be granted to state educational institutional employment. This is true because the pre-

amendment definition said that "'public employer' state." And an employee of a state educational institution is an employee of the State of New Mexico. See **Livingston v. Regents of New Mexico College of Agriculture and Mechanic** Arts, 64 N.M. 306, 328 P.2d 78. Thus what the 1971 amendment to subsection E of Section 5-5-1, **supra,** was designed to accomplish and does accomplish is to limit P.E.R.A. credit for state educational institution employment to that service performed prior to July 1, 1957.

Turning to your third question it must be noted that in order to receive prior service credit a person must have been an employee of a public employer as that term is defined in the Public Employees' Retirement Act, Section 5-5-1 D and E, **supra.** The latter subsection has been set out in full in this opinion. And subsection D defines "municipality" to include any city or county. For years the Public Employees' Retirement Board has been granting prior service credit, i.e., service prior to August 1, 1947, to public school teachers. Many people have retired under the P.E.R.A. Act using public school service as a part of their credit toward retirement. Many others have had such service approved by the Public Employees' Retirement Board as a part of their retirement credit even though they have not yet retired. They have based their retirement plans on the approval of this prior service. The legislature is presumed to be aware that for many years the Retirement Board considered public school service as employment for a city or county and thus treated it as coming within the definition of municipality in Section 5-5-1 D, and accordingly as service for a public employer. Such long standing interpretation of a statute by the administrative agency charged with its administration in conjunction with equally long standing legislative acquiescence is highly persuasive and will not be overturned lightly by the courts. **Martinez v. Research Park, Inc.,** 75 N.M. 672, 410 P.2d 200; **Ortega v. Otero,** 48 N.M. 588, 154 P.2d 252; **Valley Country Club, Inc. v. Mender,** 64 N.M. 59, 323 P.2d 1099.

As noted previously, to the extent that Opinion No. 70-103 conflicts with the conclusions enunciated herein, it is overruled.