

Opinion No. 41-3850

July 29, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. M. E. Noble President, Board of Regents New Mexico Highlands University Las Vegas, New Mexico

{*82} I have carefully read your letter of July 22 requesting an opinion as to the effect of Chapter 210 of the Laws of 1941, and I wholly agree with you that the contribution and annuity plan provided by Section 5 thereof is entirely optional with the Regents of each institution; but I do not agree with you that the right to retire teachers and pay pensions to teachers hereafter is dependent on the exercise of that option.

At some of the hearings and conferences had during the session of the Legislature with respect to this law, it was stated that certain able attorneys in Albuquerque had, on behalf of the faculty of the Regents at the University in Albuquerque, examined this statute, and their comments thereon were discussed. Not all those interested in the bill were agreed that the contribution plan was workable in all institutions, but it was generally understood that the same would be wholly optional so that those institutions which, after consultation with their faculty and with insurance companies, found it desirable, could put it into operation. It was generally agreed that where workable it would be desirable in that it would tend to afford greater security and stability as against the possibility of curtailment by future legislation or by reduction or lack of appropriation.

It was understood that the section providing for such optional plan was complete in itself, and that if it went out the statute would not be affected in any respect. Some of the attorneys mentioned had pointed to the possibility of the contribution plan being questioned on some constitutional grounds not material here, (and which none of us thought very serious), but agreed that should {*83} it happen that Section 5 here held invalid, it would in no way affect the rest of the statute because of its complete severability. As a further precaution, however, the severability clause appearing as Section 8 was added by amendment.

From the study given the act then, and from further study now in the light of your comments, I am convinced that the above was correct; and that the right to retire teachers and pay pension is exactly the same with or without the contributory retirement fund or plan. The only difference is that if the contributory retirement fund is created, there is to the extent of the annuity purchased by that fund less danger in the future of not having enough appropriation, and less danger of adverse legislation affecting such pensions.

In the first place the act, with exception of Section 5, amounts to an elaborate amendment of or substitute for Section 130-1315 of the 1929 Compilation, as amended by Chapter 119 of the Laws of 1937, and these only are specifically repealed. The

general rule is that the specific repeal of one section of a statute without repealing others is to be construed as a declared intention on the part of the Legislature to leave the others in force. Section 130-1316, 1929 Compilation, under which your budget was prepared, is therefore in full force and effect. The Appropriation Act shows an item for pensions for your institution. It is to be presumed that this covered your estimate of the amount needed for those retired or to be retired during the biennium. The amount of the pensions authorized was not changed materially. The class of persons retired was, however, somewhat enlarged, and if by reason of this unforeseen extension of the class retired, your institution should run short, it will have the right, as it does with respect to all other unforeseen contingencies, to draw upon the \$ 16,054.00 set up for contingent expenses at page 467, Chapter 212, Laws of 1941.

In the second place, had the Legislature intended retirements to be dependent on the creation of the contributory retirement fund mentioned in Section 5, it could and would have said so. It could have provided that pensions be paid out of the annuity purchased with the contributory retirement fund, but it did not. On the contrary, it provided that annuities received from the insurance "shall be credited against any pensions which may be awarded." Clearly, the Legislature did not intend for these annuities to take the place of the pension which the balance of the statute authorizes without qualification.

Furthermore, Section 3 makes it mandatory that teachers be retired at a certain age. Surely the Legislature would not peremptorily command that a teacher be retired, and then leave it optional with succeeding boards to say whether such teacher could or could not be paid. That would be the result if payment of the pension were dependent on adoption of a contributory retirement fund plan for annuities.

We referred above to the fact that this act is in effect an amendment of the law, since only one section thereof was replaced by the provisions of this act, and we observed that payments may continue in exactly the same manner as before, with credit only for annuities if any; but assuming that there were no other law of any kind except this one, the result would be the same. Section 6 commands that in every budget there should be set up such sum of money as will be required "for the payment of pensions permitted under this act." The budget is merely an estimate to guide the Legislature. It cannot be said that because the budget you prepared did not and could not include pensions for the class, if any, added by this new law, that appropriations {*84} made for pensions or under contingent expenses cannot be used to pay pensions for the added class if any are retired therefrom.

It will be observed also that annuities obtainable under the contributory retirement fund plan might not be for life, and yet the pension granted is for life. Every section and every provision of this statute clearly indicates that the pensions provided and authorized, and the annuity contracts authorized, are in no way dependent upon each other. They are germane to each other in that they are for the promotion of the same object, and each supplements the other, but each may stand entirely alone without regard to the other. If the pensions were revoked by the Legislature, or if the Legislature failed to appropriate

money therefor, this in no way would affect the contracts or the right to pay funds of the institution to match the contributions by the teachers.

Therefore, your first question, whether or not teachers may be retired without creation of the contributory retirement fund authorized, is answered in the affirmative.

Your second question is whether you may enter into contracts with insurance companies during this biennium "when no money is available for such payments." Of course, if there is no money available, you cannot enter into such contracts. It does not necessarily follow, however, that there is no money available merely because the budget did not specifically include such item. As stated above, the budget is merely a guide to the Legislature, and is not necessarily either the authority or a limitation for the payment of money. It is to the appropriations as finally made that your institution must look in considering whether it should adopt the annuity plan, -- that and other practical considerations such as the class of contracts available with the amount of money which could be realized under the limitation of 5%, the salaries paid, and the amounts which the faculty can conveniently afford for this product.

By A. M. FERNANDEZ,

Asst. Atty. General