

Opinion No. 44-4558

August 9, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Floyd Santistevan, Ass't. Supt. of Public Instruction, Department of Education, Santa Fe, New Mexico

We are in receipt of your letter of August 2, 1944, in which you state that a teacher who had taught from 1912 until 1931, served on a County Board of Education for the years 1939, 1940, 1941 and part of 1942. You further state that this man has presented affidavits executed by doctors to the effect that he is physically disabled to carry on the duties of a school teacher.

In view of these facts, you ask our opinion as to whether or not such person is qualified to obtain the benefit provided by Section 55-1117 of the 1941 Compilation. This section provides in part that:

"The Board of Education of any municipality, county, * * * may retire from service any teacher, supervisor, custodian, nurse, principal, superintendent or other professional employee employed by it * * * when such person is totally disabled from continuing in his profession * * * provided that such person has been employed in the public schools of the State of New Mexico for not less than five years."

Your basic question is whether or not the time served on a County Board of Education may be considered as employment under this section so as to entitle such board member to a disability pension.

You will observe, from the above quoted language, that board members are not included within the class subject to retirement, either directly or by implication. You will further observe that the County Board is in this section considered the retiring agency, and that it is the employer retiring specified employees.

In view of the above, it is my opinion that the time served upon a County Board of Education cannot be considered in determining whether or not a person is entitled to a disability pension under this section. Any other result would be incongruous, since board members, under Section 55-803, get only \$ 2.50 for days in actual attendance upon board meetings and, in no event, in excess of \$ 100.00, while a person retired under the above quoted section would be entitled to a minimum of not less than \$ 600.00.

It could not be contended that service as a teacher prior to the enactment of the above quoted section in 1937 could be considered alone in determining whether a person is entitled to a disability pension. First, since this section provides that the Board of Education may retire from service any teacher a person not then employed could not be

retired from service. Further, a construction which would permit the payment of a pension to a person not employed at the time of the adoption of this act would be unconstitutional, under Article 9, Section 14 of the New Mexico Constitution under the holding of *Sena v. Trujillo*, 46 N.M. 361.

In view of the foregoing, it is my opinion that a person having only the qualifications mentioned in your letter would not be entitled to a disability pension under the above quoted statute.

By ROBERT W. WARD,

First Asst. Atty. General