

Opinion No. 45-4825

December 11, 1945

BY: C. C. McCULLOH, Attorney General

TO: Floyd Santistevan Director, Teacher Retirement Department of Education Santa Fe, New Mexico

{*163} We are in receipt of your letter of November 21, 1945 and the enclosed letter from Mr. L. H. Rhodes, Superintendent of the Tucumcari Public Schools. In his letter Mr. Rhodes asks the following two questions:

"1. Will the time that the emeritus employment status becomes effective terminate the tenure rights of the emeritus employee, thus eliminating the possibility of including a year's earned salary in the five year average which determines the amount of the emeritus employment salary?"

{*164} "2. In the event an emeritus employee serves one or more years at regular salary, after being placed on the emeritus basis, will it be possible for the salary of these regular years of service to be added in the five year's average to bring up the monthly average of the retirement pay?"

I have read and re-read the first of these two questions and have not been able to ascertain the exact question Mr. Rhodes has in mind. However, I would make these observations:

First, after a teacher has 15 years educational service in New Mexico, such teacher may be retired. This retirement is not mandatory.

Second, after a teacher has been retired, of course, the teacher would not be able to invoke the teacher tenure law, Chapter 125, Laws of 1945. The two acts are entirely inconsistent. The teacher is no longer an active employee but is merely on an emeritus status and so would have no right to re-employment.

Third, retirement pay is based on the average annual salary paid to him on account of his employment during the five years of **full-time** employment at **full-time** salary next preceding the date of retirement. Thus, it would be impossible to consider any salary other than the full-time salary received for such five years prior to retirement.

In answer to the second question, attention is directed to Section 2 of the retirement law which sets up the basis of the retirement salary. This section provides in part:

"When any person who has served as an employee * * * for 20 years or more is retired as herein provided, he shall be entitled to receive annually for the remainder of his natural life and beginning at the date of such retirement 60% of the average salary paid

to him on account of his employment during the five years of full-time employment at full-time salary **next preceding** the date of retirement."

In view of this section, only the salary received prior to the date of retirement can be considered. Since the retirement salary is for life, nothing that occurs after the retirement can affect it.

In view of the foregoing, it is my opinion that the salary received by an emeritus employee after the date of his retirement cannot be considered in determining the amount of subsequent retirement pay to be received by him.

By ROBERT W. WARD,

Asst. Atty. General