

Opinion No. 46-4933

July 30, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mrs. Georgia L. Lusk Superintendent of Public Instruction Department of Education Santa Fe, New Mexico. Attention: Floyd Santistevan, Director Teacher Retirement

{*257} We are in receipt of your letter of July 19, 1946, relating to the application for retirement of a Colfax County school bus driver. It appears that this driver has made application for retirement under Chapter 50 of the Laws of 1945. He is 71 years of age and has completed 30 years of service as a school bus driver, operator and contractor for the Colfax County Board of Education. It also appears that for the last two years he has held a contract for the operation of two school busses.

In view of these facts, you ask our opinion as to whether this school bus driver is entitled to retirement.

Chapter 50 of the Laws of 1945 provides, in part, as follows:

"Section 1. The board of education of any municipality, county * * * upon request of any employee entitled to the benefits of this act * * * may * * retire from active service and establish an emeritus employment status with any teacher, supervisor, custodian, nurse, principal, superintendent or other **regular full-time employee** of the public schools. * * *"

"Section 2. When any person who has served as an employee of the public schools * * * 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 annual salary paid to him on account of his employment during the five years of full-time employment at full-time annual salary next preceding the date of retirement." (It then provides for maximum and minimum retirement salaries.)

In view of these sections, it is seen that to be entitled to retirement, a person other than a professional employee must be a regular full-time employee. Retirement pay is based on full-time employment at full-time annual salary. A very serious question exists as to whether a school bus driver is an employee of the school board. By far the majority of the courts that have considered this question hold that a school bus driver is an independent contractor rather than an employee. See *Arthur v. Marblerock Consolidated School District* (Ia.) 238 N. W. 70; *Ludlow v. Industrial Commission*, 65 Utah 168, 235 P. 884; *Davis v. Board of School Commissioners* (Ala.) 178 S. 63; *Olsen v. Cushman*, (Ia.) 276 N. W. 777.

Certainly no salary is paid to a school bus driver as such, which is necessary for the existence of an employer-employee relation. However, in the case of *Ridgell v. T. P. S. B.*, 17 So. 2d 55, the Louisiana Court held that insofar as a school bus driver contracted to furnish transportation for school pupils, he was an independent contractor, but insofar as he furnished labor and personal services, he was an employee. But even if it be assumed that a school bus driver is an employee of the school board, this is not sufficient to entitle him to retirement. To be entitled to retirement, an employee must be a regular and full-time employee.

In Opinion No. 4741, we attempt to define what was meant by the language "regular full-time employee." We there held that the Legislature intended to distinguish such employees from special employees, temporary employees and part-time employees.

{*258} In many instances school bus drivers do not devote their full time to transporting pupils. Thus, it would appear that even though school bus drivers be considered employees, that many of them could not be considered fulltime employees. In many other instances, the person holding the contract does not drive the bus at all. In fact, in some instances, one individual holds all the contracts for a particular school district. He, in turn, employs drivers to drive the busses so that he performs no personal services. Further, it appears that even though school bus drivers be considered employees, they could not be considered regular fulltime employees since their employment is of a special nature.

The Legislature, by Section 2 of Chapter 50, set forth above, provided that the retirement pay should be based on full-time salary for full-time employment. As noted above, school bus drivers are not paid a salary as such. Rather, they are given a lump sum which covers both their services and the operation and maintenance of the bus. No procedure is set out by the statute to determine how much of this is for personal service. Any figure must of necessity be arbitrarily arrived at.

If the Legislature had specifically intended to cover school bus drivers, some provision would have been made to determine his salary basis for retirement. It has been suggested that it would be unfair to permit a janitor to retire and not a school bus driver. On the other hand, it would be just as unfair to permit a school bus driver who holds a contract in his own name to retire and not permit the retirement of a person who actually has driven a school bus for 30 years as an employee of a person holding a school bus contract. Yet, such a driver could not conceivably be an employee of the school board, since he is employed by a private individual. It would also be unfair to permit a person to receive retirement pay who had actually operated his own bus and not permit a person who has held a great many contracts, but who has not personally driven the bus.

In view of the foregoing, it is my opinion that it was not the legislative intent as expressed in Chapter 50 of the Laws of 1945 to include school bus drivers in the category of "other regular full-time employees," so that a school bus driver is not entitled to the benefits of the Retirement Act. I enclose herewith an additional copy of this opinion for your use.

By ROBERT W. WARD,

Asst. Atty. General