

Opinion No. 153.**Public Employees' Retirement System
Retirement System.**

Held: Public employee's election not to become member of the Public Employees' Retirement System—as provided by paragraph (f) of Section 5 of Chapter 212, Laws of 1945—is determinative of such employee's status only so long as his state service continues thereafter. If his state service terminates and he subsequently re-enters state service, he shall become a member of the Retirement System as provided by Section 4 of Chapter 212, Laws of 1945.

May 8, 1946.

Hon. Sam W. Mitchell, President
Board of Administration
Public Employees' Retirement
System
State Capitol
Helena, Montana

Dear Mr. Mitchell:

You have presented this problem:

"X" was originally employed in the services of the State of Montana on August 30, 1943. At the time Chapter 212, Laws of 1945, became effective, he availed himself of the privilege granted by paragraph (f) of section 5 of the chapter, and elected not to become a member of the Public Employees' Retirement System. He terminated his employment by resignation on October 31, 1945. He

was re-employed by the State of Montana in January, 1946; and the question now arises whether his original election not to become a member of the Retirement System is permanently determinative of his status.

Section 4 of Chapter 212, Laws of 1945, provides:

"Except as herein expressly excluded from membership all employees shall become members of the retirement system as follows:" (a) From and after the date this system becomes effective, every employee who has rendered one-half ($\frac{1}{2}$) year of continuous service is a member of the retirement system and every other employee shall become a member after the completion of six (6) months of state service, uninterrupted by a break of more than one (1) month, provided that an employee who has entered or enters state service after January 1, 1946, as the result of the assumption by the state of a governmental function previously exercised by a political subdivision thereof and under which function he was employed for at least such six (6) months' period immediately preceding such assumption, shall be considered a member of and after the date of said entry into state service.

"(b) Every employee who re-enters state service after the date this system becomes effective, and who, prior to such re-entry has completed six (6) months of state service, uninterrupted by a break of more than one (1) month, shall become a member of the retirement system upon such re-entry. Time during which an employee of a school district is absent from state service during official vacation, shall be counted as service in determining eligibility for membership under this act." (Emphasis mine.)

Section 5 of the chapter enumerates those employees who shall not become members of the Retirement System, and paragraph (f) thereof is the portion which gave to state employees in service on July 1, 1945, or prior thereto, the privilege of filing an election not to become members of the system. Nowhere in Section 5 is there an ex-

clusion from the benefits of the system of employees re-entering state service.

The legislative power in enacting the law is presumed to have understood the ordinary and elementary rules of construction of the English language, and we must therefore construe the law according to the context and the approved usage of the language. (Section 15, Revised Codes of Montana, 1935; State ex rel. Palagi v. Regan, 113 Mont. 343, 349, 126 Pac. (2d) 818, 823.)

It is obvious the legislative assembly, by its language employed in Section 4, supra, intended all employees of the state shall become members of the Retirement System with the exception of those expressly excluded under the terms of the act. The word "expressly" is defined by Webster's New International Dictionary, Second Edition, 1941, in this fashion:

"In an express manner; in direct or unmistakable terms; explicitly; definitely; directly."

In enacting Section 5 of the act, the legislative assembly attempted to state in unmistakable terms and with definiteness those employees who shall not be members of the Retirement System. Since it did not see fit to exclude expressly individuals who might re-enter state service under circumstances, such as those involved in your problem, it cannot be said such persons have been excluded.

The policy of the law, while not controlling, is persuasive in determining the meaning of statutory provisions. (State ex rel. McGowan v. Sedgewick, 46 Mont. 187, 190, 127 Pac. 94, 95; Ferguson Motor Co. v. Sorenson, 73 Mont. 122, 126, 235 Pac. 422, 423.) Chapter 212, Laws of 1945, was obviously designed by the legislative assembly as an act to benefit, safeguard and protect the employees of the state. Consonant with such a laudable intention, the legislative assembly provided that all employees, with but a few necessary exceptions, must become members. Since the persons who were working as employees of the State of Montana at the time of the passage of the act were already fulfilling a contract with the state, the legislative assembly was forced to extend to those individuals a right of election. To have forced them under the act would have been a violation of Section 11, Article

III of the Constitution of Montana, which provides no law impairing the obligation of contracts shall be passed by the legislative assembly.

State ex rel. State Savings Bank v. Barret, 25 Mont. 112, 119, 120, 63 Pac. 1030, 1032, sets out the rule the legislature can no more impair the obligation of a contract entered into by the state than it can the obligation of a contract made between individuals.

In effect, what the legislative assembly said to the employees of the state was this: You who are now employed or were employed prior to July 1, 1945, shall have the right to elect whether you shall become members of this system. But if you terminate your state employment, and re-enter state service at some subsequent date, you will be entering into a new contract, and one of the provisions of your new contract shall be that you become a member of the Public Employees' Retirement System.

This action of the legislature may have been predicated on several reasons. Without doubt, the legislative assembly desired uniformity of application of Chapter 212. Such uniformity of application is beyond achievement if those persons who were in employment at the time an election regarding membership was available to them, can terminate, re-enter, terminate and re-enter contracts with the state for decades to come without coming under the provisions of the Retirement System. Chapter 212 is social legislation designed for the benefit and protection of public employees; and social legislation loses its sociological identity when it loses its uniformity.

It is my opinion a public employee's election not to become a member of the Public Employees' Retirement System—as provided by paragraph (f) of Section 5 of Chapter 212, Laws of 1945—is determinative of such employee's status only so long as his state service continues thereafter. If his state service terminates and he subsequently re-enters state service, he shall become a member of the Retirement System as provided by Section 4 of Chapter 212, Laws of 1945.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General