

**Opinion No. 199.**

**Teachers' Retirement Act—Salary  
Eligibility Under New System.**

HELD: A teacher disqualified for a pension under former system, by reason of receiving salary from other source is entitled under new system to receive such pension.

November 19, 1937.

Hon. Ray N. Shannon  
State Treasurer and Chairman,  
Teachers' Retirement Board  
The Capitol

Dear Mr. Shannon:

Mr. John W. Mahan, City Attorney of Helena, Montana, has submitted to this office the inquiry as to whether or not A. J. Roberts is entitled to the benefits of a teacher's pension. Inasmuch as a decision upon this matter must be arrived at by the board, I am addressing our answer to his communication to you.

From the facts stated in Mr. Mahan's communication, it appears that Mr. Roberts, having fulfilled the age and service requirements, involuntarily retired under the former teachers' retirement system. Upon his retirement, being eligible for a pension thereunder, he received the same for some period of time, and thereafter, being elected mayor of the City of Helena, he received a salary from that source in excess of two thousand dollars per annum, and, in accordance with the provisions of Section 1117, became temporarily ineligible to continue receiving the benefits of that pension provided for in Sections 1113 to 1132, inclusive, which sections relate to the former teachers' retirement system.

Section 20 of Chapter 87 of the 1937 Session Laws expressly provides that all acts and parts of acts in conflict with said chapter are repealed. The members who retired under the former retirement system, as aforesaid, acquired certain benefits based upon their age and service qualifications, which qualifications were expressly provided in both the former and present retirement systems.

It is not necessary for me to determine whether or not the legislature had the power to create a qualification which would exclude a member from the benefits of the former retirement act, as it did in Section 1117, for the reason that the general language found in Section 12 of Chapter 87 has repealed Section 1117. Section 1117 is repealed because it conflicts with the general language of Section 12 of said Chapter 87.

The new retirement system has increased the age and service qualifications found under the former act, yet

the benefits members received under the former system have been preserved and recognized in the new act. Mr. Roberts was entitled to the benefits under the former system, subject to a temporary disability which would re-invest upon the termination of said temporary disability. The rights of members under the former system have been preserved within the new system, but the detriments, and particularly this detriment, have not been re-established. The legislature has specifically defined the rights of members of the former system, and having done so, such rights become exclusive, and having omitted to include the two thousand dollar salary qualification, as found in Section 1117, the same cannot be inserted therein. An express rule of statutory construction forbids the insertion of that which is omitted, or the omission of that which is inserted.

Paragraph (4) of Section 12 of said Chapter 87, provides:

"Any such person who having retired upon a retirement allowance under said former retirement system, shall have retired after having served as a teacher for at least thirty-five school years, fifteen of which, including the last ten years, shall have been in the schools of this State, and who shall elect under the next preceding subdivision of this section to receive his interest in said public school teachers' retirement salary fund and said public school teachers' permanent fund in the form of an annuity, shall be entitled, while he shall remain retired, to receive and be paid from the said pension accumulation fund an annual allowance which, together with his said annuity, shall equal the sum of \$600.00. Any other person retired upon such allowance who shall elect to receive his interest in said funds in the form of an annuity shall, upon reaching the age of sixty years, be entitled, while he shall remain retired, to receive and be paid from the said pension accumulation fund an annual allowance, which together with his said annuity, shall equal a sum which shall be that proportion of \$600.00 which the number of school years which he shall have served as a teacher, and credited under the former retirement system bears to thirty-five."

The facts in Mr. Roberts' case come squarely within the above statute. It is presumed that the legislature, when enacting Chapter 87, took into consideration the existing laws upon the subject. We have every right to presume that new legislation shall be in accordance to equity, and in consideration of rights formerly existing. If Mr. Roberts, who was compelled to involuntarily retire under the former system, had retired under the new act after September 1, 1937, no one would attempt to contend that the fact that he is receiving a salary from other sources in excess of two thousand dollars per annum would act as a disqualification to receiving his pension, and to now contend that because he retired under the former act, when the new act does not contain a salary qualification, would be to assume a legislative purpose inconsistent with the elementary rules of statutory construction.

Therefore, it is my opinion that Mr. Roberts is now entitled to the benefits of a teacher's pension, although he is now receiving a salary from other sources than teaching school, in excess of the sum of two thousand dollars per year.