

No. 321

**MEMBERSHIP IN TEACHERS' RETIREMENT SYSTEM—TEACHERS' RETIREMENT CONTRIBUTIONS—EMPLOYER—PRIOR SERVICE CERTIFICATES**

**Held:** Where teacher never notified Teachers' Retirement Board he did not desire to become member, within statutory time, he automatically became member of Teachers' Retirement System. It then was the mandatory duty of his employer to notify the Board and make monthly deductions for the teacher's salary of contributions and transmit same to the Board. Where the employer failed to perform the duty required by statute, such failure will not affect the teacher's membership or prior service rating. The board may now, under its rules and regulations, require delinquent payments to be deducted, as it may prescribe in its rules and regulations.

December 19, 1941.

Miss Elizabeth Ireland, President  
Teachers' Retirement Fund Board  
Capitol Building  
Helena, Montana

Dear Miss Ireland:

You have submitted the following:

"An employee in the office of the State Department of Public Instruction who automatically became a member of the present Teachers' Retirement Law, when it went into operation September 1, 1937, has failed to pay into the Retirement Fund five per cent (5%) of her salary for the following time:

September 1, 1937, to September 1, 1938  
September 1, 1938, to September 1, 1939  
September 1, 1939, to September 1, 1940  
September 1, 1940, to January 5, 1941

"This is a period of more than three years.

"Since January, 1941, this teacher has been employed in the public schools and each month the monthly installments due by her to the Teachers' Retirement Fund have been paid up to date.

"Has this teacher lost her prior service, due to the fact that there are past due installments unpaid for more than three years?

"If she has not lost her prior service, must she pay the delinquent installments due the Teachers' Retirement Fund; and if so, can this be done on the installment plan, or must the full payment be made in one lump sum?"

As you have stated, the employee in the office of the State Department of Public Instruction automatically became a member of the present Teachers' Retirement System, under the terms of the act embraced in Chapter 87, Laws of 1937, as amended by Chapter 215, Laws of 1939, when the law became effective on the first day of April, 1937. Owing to the fact no payments were made on behalf of this member during the period from September 1, 1937, to and including December, 1940, has this member lost her membership and, by losing her membership, thereby lost her prior service?

Section 1 of Chapter 215, Laws of 1939, defines a teacher under the act, and Section 2 of Chapter 215, Laws of 1939, provides in part as follows:

"All persons who were teachers in the public elementary and high schools of the State during the school year nineteen hundred and thirty-six to nineteen hundred and thirty-seven, and who continue to be teachers shall become members as of the date of establishment except that any such teacher may notify the board on or before the thirtieth day of November, nineteen hundred and thirty-seven, in such form as the board may prescribe, that he does not desire to become a member, and in such case the board shall exclude him from the membership."

I am assuming, in the instant case: (1) the teacher did not so notify the Board, and therefore, continued as a member as far as such provision is concerned; and (2) the teacher desires to remain a member and retain his prior service rating.

The next provision to be considered is Section 2 of Chapter 215, Laws of 1939, p. 576, which is in part:

"The membership of any person in the retirement system shall cease if he shall be continuously absent without pay for a period of more than three years or if in any period of ten consecutive years after he last became a member he shall render less than five years of service as a teacher or if he withdraws his accumulated contributions or retires on a pension or dies, but not otherwise, except that the membership of a teacher who has not withdrawn his contributions and who has not had sufficient service to be eligible for disability retirement shall not be cancelled, provided the member shall prove to the satisfaction of the retirement board that absence from service was caused by personal illness constituting disability." (Emphasis mine.)

It is to be noted the last above-quoted part of Section 2 provides for the termination of the membership of a teacher in the Retirement System, in the following contingencies:

1. If he shall be continuously absent without pay for a period of more than three years;
2. Or if in any period of ten consecutive years after he last became a member, he shall render less than five years of service as a teacher;
3. Or if he withdraws his accumulated contributions;
4. Or if he retires on a pension;
5. Or if he dies.

Membership is not terminated otherwise, "except that the membership of a teacher who has not withdrawn his contributions and who has not had sufficient service to be eligible for disability retirement shall not be canceled, provided the member shall prove to the satisfaction of the retirement board that absence from service was caused by personal illness constituting disability." (Emphasis mine.) I am assuming the employee or teacher was not absent nor without pay for a period of more than three years, that he has rendered at least five years' service in the last

consecutive ten years, that he has not withdrawn his accumulated contributions, that he has not retired on a pension, and that he is still alive.

The last part of the above-quoted portion of Section 2, Chapter 215, Laws of 1939, p. 576, obviously refers only to a member suffering from personal illness constituting disability.

Section 1, Chapter 215, Laws of 1939, p. 572, defines the employer as follows:

“‘Employer’ shall mean the State of Montana or the board of trustees of any school district employing teachers subject to the provisions of this act; or other agency of and within the State by which the teacher is paid.”

Section 9 in paragraphs (1), (2), (3) and (4), Chapter 87, Laws of 1937, sets forth part of the duties of the employer; and Section 10, paragraph (a), Chapter 87, Laws of 1937, provides:

“Each employer shall cause to be deducted on each and every payroll of a member for each and every payroll period subsequent to the first day of September, nineteen hundred and thirty-seven, the contribution payable by such member as provided in this act.”

The foregoing paragraphs set forth in mandatory language the duty of the employer to deduct and transmit monthly the payments of the contributions of each member. The whole act is based on the assumption this duty will be performed.

Evidently this duty was not performed by the employer in this case. The employee should not be penalized for this neglect of an official to perform an official duty. As long as a member retains his membership, he also retains his prior service certificate; and when his membership ceases, such certificate shall be void. (Section 3, Chapter 215, Laws of 1939, p. 578.)

Section 3, paragraph (1) of Chapter 87, Laws of 1937, provides that, subject to the limitations of this act, the Retirement Board shall, from time to time, establish rules and regulations for the administration and proper operation of the retirement system.

In the case you have submitted, the teacher has a valuable, equitable right in maintaining his membership and prior service rating. This right may not be taken away from him through the neglect of a public official to perform his statutory duty. One of the oldest equitable maxims of the law is, “Equity considers that as done which should have been done.” The courts have stated the principle many times as follows:

“Equity will treat as done that which the parties agreed to have done, and which ought to have been done.”

*Remington v. Higgins*, 54 Cal. 620.

The foregoing applies to the Board. It is also true the teacher-member owed a duty to the Board. And in like manner, we find another equitable maxim that applies with equal force, “He who seeks equity must do equity.”

“This familiar maxim of equity means that the court will not confer its equitable relief upon one seeking its interpretation and aid unless he has acknowledged or conceded, or will admit and provide for, all the equitable claims, rights, and demands justly belonging to the other party growing out of or necessarily involved in the subject matter of the controversy.”

*O'Brien v. O'Brien*, 197 Cal. 577, 241 Pac. 861.

It is therefore my opinion: Under the facts you have given me and the applicable statutes, the said employee or teacher is still a member of the teachers' retirement system, and has been at all times since its creation, and therefore, retains her prior service certificate; under the general powers of the Board, the Board may require the delinquent payments to

be paid into the retirement fund on a basis to be determined by the Board, under its rules and regulations governing such instances; the same may be prorated and deducted from the subsequent months, or otherwise, as the Board may determine.

Sincerely yours,

JOHN W. BONNER  
Attorney General