

Opinion No. 129

Teachers' Retirement System—Withdrawal of Member With Ten Years of Service—Election to Withdraw.

Held: That if an election is not made by affirmative action by a member of the Teachers' Retirement System, who has ten years or more of service, to withdraw his accumulated contribution within six months after termination of service, otherwise than by death or retirement, such member cannot withdraw his contributions. Such member upon reaching retirement age will be entitled to a pension.

October 2nd, 1950.

Mr. R. W. Harper, Executive Secretary
The Teachers' Retirement System
State Capitol
Helena, Montana

Dear Mr. Harper:

You have requested my opinion concerning the status of the account of a teacher with ten or more years of service whose service is discontinued otherwise than by death or retirement and who takes no action in regard to his retention of membership in the retirement system within six months after discontinuance of service.

In considering your question it is necessary to examine Section 4, Chapter 87, Laws of 1937, as amended by Chapter 215, Laws of 1939, Chapter 15, Laws of 1945 and Chapter 28, Laws of 1949, which section reads in part as follows:

"The membership of any person in the retirement system shall cease: . . .

(b) 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contributions or retires on a pension or dies, but not otherwise, except that the membership of a teacher who has not withdrawn his contributions and who has not had sufficient service to be eligible for disability retirement shall not be cancelled, provided the member shall prove to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, or service in the Armed Forces of the United States which includes all members of the Army, the Navy, the Marine Corps, and the Coast Guard, or service in the American Red Cross and Merchant Marine during time of war, and **provided any member with ten (10) or more years of service, whose service is discontinued otherwise than by death or retirement, shall have the right to elect within six (6) months after such termination of service, and without right or revocation, whether to allow his accumulated contributions to remain in the retirement fund.** Upon the qualification for retirement by reason of age or disability of a member

who has elected to allow his accumulated contributions to remain in the retirement fund, he shall receive a retirement allowance in accordance with the provisions of the teachers' retirement act." (Emphasis supplied.)

The emphasized portion of the above quoted section indicates that those members with ten or more years of service are in a different category than those members with a shorter service record. The reason for the distinction is apparent when Subsection 1 (a) of Section 6, Chapter 87, Laws of 1937, as amended by Chapter 137, Laws of 1945, and Chapter 28, Laws of 1949, is considered as it provides:

"Any member in service who has completed ten years of creditable service, the last ten years of which shall have been in this State, and who has attained the age of sixty may retire from service, if he files with the Retirement Board his written application setting forth the fact of his retirement."

The result of ten years of service is that the member has satisfied the minimum requirements for a pension. As expressly stated in the last sentence of Section 4, Chapter 87, Laws of 1937, as amended, and first quoted above, a member of the retirement system who has completed ten years of service and who has left his contributions in the retirement fund shall receive a pension upon qualification for retirement by reason of age or disability.

If a member does not take any affirmative action by either withdrawing his contribution or advising the Board of the retirement system that he will leave his contribution in the retirement fund within the six months period, then it is reasonable to assume that by inaction the member has lost his right to withdraw. An obvious ambiguity is found in the statute under consideration as to such members, but the fact he has acquired a right to a pension by his ten years of service should result in its retention as a matter of law. Analogous situations have occurred in the construction of life insurance policies such as the case of *Jeske v. Metropolitan Life Ins. Co.*, 113 Pa. Super. Ct. 118, 172 A. 172, wherein the court held that after the death of the insured, "the law will apply the option most advantageous to the insured, or his beneficiary."

See also: *McEacheron v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S.E. 820, *Marti v. Midwest Life Ins. Co.*, 108 Neb. 845, 189 N.W. 388, 29 A.S.R. 1507.

The fundamental principle found in all retirement systems is the protection of the participating member during his declining years, and the construction given to the Montana statute under consideration which will further such principle is more beneficial to the members as a whole.

It is therefore my opinion that if an election is not made by affirmative action by a member of the teachers' retirement system, who

has ten years or more of service, to withdraw his accumulated contributions within six months after termination of service, otherwise than by death or retirement, such member cannot withdraw his contributions. Such member upon reaching retirement age will be entitled to a pension.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.