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February 23, 1962  
Letter Opinion No. 62-28-L

REQUESTED BY: Hon. W.W. "Skipper" Dick  
Superintendent of Public Instruction

QUESTION: Is a school board of trustees authorized to withhold funds from the salary of a certificated employee for the purpose of purchasing an annuity contract for the certificated employee in order to qualify for the exclusion from gross income as provided by 26 U.S.C. §403 (b) as amended 1961?

CONCLUSION: No.

This opinion does not affect or determine whether an annuity contract would or would not qualify for the exclusion of the payments from the gross income of the certificated employee as this is a federal question to be determined by the proper federal authorities. This opinion assumes the federal law requires the employer-school district to purchase the annuity contract. 26 USC §403 (b), Internal Revenue Code, as amended 1961, is quoted below:

"(b) Taxability of beneficiary under annuity purchased by section 501(c) (3) organization or public school.

(1) General rule. - If -

(A) an annuity contract is purchased -

(i) for an employee by an employer described in section 501(c) (3) which is exempt from tax under section 501 (a), or

(ii) for an employee (other than an employee described in clause (i)) who performs services for an educational institution (as defined in section 151(e) (4), by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing.

(B) Such annuity contract is not subject to subsection (a), and

(C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,

then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year. The employee shall include in his gross income the amounts received under such contract for the year received as provided in section 72 (relating to annuities except that section 72(e) (3) shall not apply." (Emphasis supplied).

§15-443(a) A.R.S. provides for the entering into annual contracts between the school board of trustees and certificated teachers. The pertinent statutory provision is quoted in toto:

"§15-443.

- A. The board of trustees shall employ all employees of the schools under written contract. The board may at any time after the annual election and the qualifications of new members, enter into contracts with and fix the salaries of teachers, principals, janitors, attendance officers, school physician, school dentist, nurses, and other employees necessary for the succeeding year."

An annuity contract is a contract or obligation to pay an annuity. It is a term applied to an obligation to pay the annuitant a certain sum of money at stated times during life, or a specified number of years in consideration of a gross sum paid for such obligation. 3 C.J.S. Annuities §1(a) (4) p. 1374.

In order for an annuitant to receive a fixed sum payable for life or any number of fixed payment over a period of time the annuity contract may require contributions from the potential annuitant over a period greater than a year. This, of course, would depend upon the terms of the annuity contract. It is contended that the withholding of any funds from the salary of a certificated employee would be on a voluntary basis between the school board and the particular employee and that this is not prohibited by the Arizona statutes. Standing alone, this appears to be a plausible argument, but the contention does not consider any of the legal implications involved. For instance, if the agreement is on a voluntary basis between the school board and the certificated employee there is a possibility that either party would refuse to continue the agreement. Moreover, even if particular agreement is incorporated in the written contract between the school board and the certificated employee, the contractual provisions would only cover the period of one year and the school board would not in any manner be bound to incorporate such a provision in any subsequent contract as A.R.S. §15-443(A) provides for an annual contract between the school district and teacher. Also, if the certificated employee changed his or her employment from one school district to another, the board of the new employer-district would not be obligated to provide for the withholding of funds. The occurrence of any of the above described events could produce a situation which might result in the forfeiture of any benefits by failure to pay the premiums or payments as required by the annuity contract if such a contract covers a period greater than a year. Generally, it may be stated that a school district possesses those powers that are expressly conferred or are implied as necessary to carry out the express objects or purposes. 47 Am. Jur. Schools §13 p. 307.

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It is our opinion that a board of trustees does not possess any express or implied power to withhold funds from the salary of a certificated employee for this particular purpose.

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