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July 23, 1951
Op. No. 51-201

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Mr. W. T. Holmes
Civil Deputy County Attorney
Pima County Courthouse
Tucson, Arizona

Dear Mr. Holmes:

We have your letter of June 20, 1951 wherein you ask this office for an opinion concerning the following matter:

"I will, therefore, greatly appreciate your advising us as to the manner in which Pima County may at the earliest possible time effect a withdrawal from the Public Employees' Retirement Fund of Arizona and make an application to the Employment Security Commission of Arizona for participation under the Federal Social Security Act."

As we understand it your contention is that inasmuch as funds have not been withheld from employees' wages and the county has made no contribution to the retirement fund, Pima County has joined the retirement fund but not participated therein. Thus under the provisions of Section 12-822 ACA 1939, as amended, the pertinent part of which reads as follows:

"Any municipality after having joined the fund and having been a participant therein, shall be permitted to withdraw from the fund, under the conditions prescribed in section 25 (§ 12-825) hereof." (Emphasis supplied)

Pima County should be permitted to withdraw forthwith by giving notice and need not withdraw in accordance with Section 12-825.

Assuming for the purpose of this opinion that Pima County has not been a "participant therein", this is a very difficult question in itself and one person's guess is about as good as the next until

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our Supreme Court determines this matter, then it is our opinion that Pima County must still withdraw from the fund under the conditions prescribed in Section 12-825, the pertinent part of which provides:

"Any municipality shall be permitted to withdraw from the fund upon six months notice to the board, and withdrawal shall take effect as of June 30 next following the expiration of said period of six months. * * *"

A strict construction of Section 12-822 above quoted might be that since this section sets forth the minimum conditions under which a municipality can withdraw, failure to comply with all of these conditions prevents the municipality from withdrawing from the retirement fund. We agree that it would be ridiculous to say that a municipality could withdraw after it had joined the fund and participated therein, but if it had only joined the fund then it could not withdraw. We do believe however that the purpose of this section was to permit a municipality to withdraw from the fund even though it had joined the fund and in addition thereto participated in the program. The compliance with only one of these requirements would not prevent a municipality from withdrawing, but in any event this section does not give a municipality affirmative authority to withdraw unless it complies with all the conditions set forth in Section 12-825, supra, which is the section authorizing withdrawals.

Specifically answering your question, in our opinion, June 30, 1952 would be the earliest possible time in which Pima County could complete its withdrawal from the Public Employees' Retirement Fund of Arizona.

We call your attention, however, to the part of Section 12-825 which provides that even after withdrawal:

" * * * should any deficiency exist in the reserve requirements of beneficiaries and prospective beneficiaries as hereinabove set forth, the municipality shall be required to make the additional contributions necessary to provide the reserves for those beneficiaries."

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We are not attempting in this opinion to resolve the question as to whether or not Pima County may in the future be liable to make additional contributions to provide reserves for individuals who have a possible vested right in the fund. We are enclosing an opinion No. 51-126, dated May 4, 1951, the last part of which discusses the possibility of such liability on the part of the county.

Answering the second part of your question, in our opinion, June 30, 1952 would be the earliest possible date at which time Pima County could apply to the Employment Security Commission of Arizona for participation under the Federal Social Security Act and have any reasonable prospect of success. We feel it our duty to caution you that even at that date success cannot be guaranteed.

You are undoubtedly familiar with Section 218 (d) of the Social Security Act amendment of 1950, which provides:

"No agreement with any state may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

The Regional Attorney for the Social Security Administration in San Francisco has expressed the view that this section not only prevents states and municipalities which presently have retirement plans from coming under Social Security, but might prevent states and municipalities which have abrogated the retirement plan from coming under Social Security if employees of such states and municipalities have vested rights which will continue after the plan is abrogated. This is based upon the theory that if employees have vested rights they are covered by a retirement plan within the purview of Section 218 (d), supra.

We are not in this opinion attempting to decide this question and do not necessarily concur in this construction, however should this be the interpretation given the section by the Federal Administrator, then, as stated in the last part of the enclosed opinion No. 51-126, certain employees of Pima County might well have vested rights under the state plan and thus Pima County's application to come under the Social Security plan may not be approved when

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submitted on June 30, 1952.

We trust the foregoing will be of some assistance to you.

Very truly yours,

FRED O. WILSON
Attorney General

KENT A. BLAKE
Assistant Attorney General

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