

**OPINION
47-204**

July 10, 1947 (OPINION)

RETIREMENT

RE: Employees Penal Institutions - Compensation Authorized

This office is in receipt of your letter of July 9, 1947, in which you say that one of the employees of the state penitentiary is, under the terms of Senate Bill No. 112 enacted by the 1947 Legislature, entitled to retirement compensation, having been employed at the institution for more than thirty years.

This bill provides that a person eligible for retirement shall be paid at the rate of one-half of the average salary received by him for the last ten years of his employment.

The question which you desire this office to answer is: Should this retirement salary be based on the base salary only or should it be based on the so-called base salary plus maintenance and plus overtime earned, if any?

In your letter you say:

"For example: John Jones is employed at \$100.00 per month. He is paid an additional \$20.00 per month for maintenance allowance if residing outside the institution. He has earned \$5.00 overtime during the month. His total salary for the month amounts to \$125.00 while the base salary is only \$100.00 per month.

"The above example covers the employee who resides outside the institution but we also have a number of employees who reside within the institution--that is, they have board, room and laundry supplied for them in addition to the base salary. In the event that one such employee becomes eligible for retirement, should we base his retirement pay on the base salary only or shall the value of maintenance furnished to him be considered as a part of the salary paid and his retirement pay be determined accordingly?"

It is, of course, obvious that the amount allowed for maintenance outside of the institution, or the equivalent thereof furnished in the institution in the form of board, lodging, laundry, etc. is just as much a part of the employee's compensation or salary as his so-called "base salary." Therefore, the compensation upon which to base the retirement pay of "John Jones" in the example given in your letter would be the average of his monthly base pay plus cash allowance for maintenance outside of the institution. In other words, if the average monthly salary of an employee, including maintenance allowance outside of the institution, is \$120.00, he is under the terms of Senate Bill No. 112 entitled to retirement pay in the sum of \$60.00. For whether an employee is paid in cash or is given the equivalent thereof in the form of board, lodging, and laundry, makes no difference in the determination of the amount of

retirement pay to which he is entitled.

whether or not the amount of money earned by an employee for overtime during the ten years preceding his retirement should be considered is a question concerning which there may be serious doubt. The answer to that question depends upon the intention of the Legislature. And it is not possible to categorically say what the legislative intention was in that regard. Section 2 of Senate Bill No. 112 provides:

"When eligible for retirement, each employee shall be entitled to payment of a wage equal to one-half of the average monthly salary or wages paid such employee during the ten years next preceding his retirement. Such monthly retirement wage shall be paid out of the salaries and wages account of the institution formerly employing such person."

It is my conclusion that the phrase "average monthly salary or wages paid such employee" means the same as "average monthly salary or wages received or earned by such employee." It is, therefore, my opinion that payments for overtime should be included in determining the average monthly salary on which retirement pay is based, if it was understood that the payment for overtime would be allowed.

another question which you desire answered is whether an employee eligible for retirement pay who has worked in the penitentiary twine plant, which is a state industry, the earnings of which are paid into a separate and distinct fund and the expense of operation of which is paid out of that fund, should be paid out of the twine plant fund or out of institutional funds of the penitentiary.

It is my opinion that an employee who works in the twine plant is an employee of the state penitentiary and that his retirement pay should come from institutional funds--not the twine plant revolving fund. The twine plant is, of course, a part of the penitentiary. It is an industry within the institution. The twine plant revolving fund was set up so as to allow the plant to be operated as a business and not be hampered by constitutional and statutory restrictions applicable to public officer.

NELS G. JOHNSON

Attorney General