

Opinion No. 65-13

January 26, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Kenneth A. Davis, Director, Educational Retirement Board, Santa Fe, New Mexico

QUESTION

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May a member who is retired under the Educational Retirement Act continue to receive benefits under such Act while engaged in employment covered by the Public Employees' Retirement Association?

CONCLUSION

Yes.

OPINION

{*24} ANALYSIS

Under the fact situation set forth in the question herein presented it is apparent that an individual has accumulated the necessary retirement requisites for retiring under the Educational Retirement Act of the State of New Mexico, has actually retired and commenced receiving benefits under such Act, and has thereafter acquired a state position of employment normally covered by the Public Employees' Retirement Act.

The Educational Retirement Act (Sections 73-12-34 through 73-12-91, N.M.S.A., 1953 Comp.) does not expressly prescribe such payment of educational retirement benefits to a person employed in a state position outside the educational retirement coverage. Section 73-12-51, N.M.S.A., 1953 Compilation, sets out in full:

"Regular membership. -- Except as herein provided, regular membership as described in Section 2 (73-12-35), subdivision B, of the Educational Retirement Act, shall be a condition of employment and shall exclude membership and participation in any other retirement program of the state of New Mexico."

This section prohibits a member of the educational retirement system from participating in any other retirement program of the state of New Mexico, but such does not prohibit an individual from employment in a state position which is not covered by the Educational Retirement Act.

Examination of the Public Employees' Retirement Act (Sections 5-5-1 through 5-5-23, N.M.S.A., 1953 Comp.) indicates that such act expressly excludes from membership under such retirement program, under Section 5-5-6, supra, "any person who has been retired by or is receiving an annuity from any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions, except the State Police Pension Fund established under the provisions of Laws of 1939, Chapter 213, Sec. 39-4-1 through 39-4-11, N.M.S.A., 1953 Comp.)." Additionally, under Section 5-5-6, supra, the Public Employees' Retirement Board may exempt from "membership" in such system employees in occupational classifications of a part time, temporary, seasonal or casual nature."

Under former Attorney General's opinion No. 60-164, dated September 21, 1960, this office held that a person cannot draw retirement benefits from both the Public Employees' Retirement Act and the Educational Retirement Act. However, this restriction is not here applicable, since the individual in question is not apparently eligible for retirement under the Public Employees' Retirement Act because of the restrictive provisions contained in Section 5-5-6, supra. We see no material difference in {*25} the situation posited and the situation where an individual receiving benefits under the Educational Retirement Act secures employment in another state.

Careful examination of the Retirement Reciprocity Act (Sections 5-11-1 through 5-11-5, N.M.S.A., 1953 Comp.) fails to indicate any statutory provisions which would entitle an individual **once retired** under either the Educational Retirement Act or the Public Employees' Retirement Act to utilize the Retirement Reciprocity Act to obtain retirement benefits from both retirement systems or to extend retirement benefits thereunder, since the Retirement Reciprocity Act contemplates expressly that the member seeking reciprocal service credit will not yet have actually retired from either state retirement system.

Thus, it is our opinion, that an individual is not precluded from receiving retirement benefits under the Educational Retirement Act and maintaining public employment in the State of New Mexico, in a position normally subject to coverage under the Public Employees' Retirement Act, so long as such person does not in any manner participate in any other retirement program other than the Educational Retirement Act.