

Opinion No. 65-190

September 29, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. John C. Hays, Executive Secretary Public Employees' Retirement Association, 113 Washington Avenue, Santa Fe, New Mexico

QUESTION

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1. If a person has retired under the Educational Retirement Act, can he also retire under the legislators' retirement provisions of the Public Employees' Retirement Act when he has already been given service credit under the Educational Retirement System for the same period of time for which he is claiming legislative retirement?
2. If a member of the Educational Retirement System or the Public Employees' Retirement System who has retired is subsequently elected to the legislature, may such person receive retirement credit for such legislative service?
3. If a retired member of either system were elected to the legislature, would he be entitled to draw his annuity while serving in the legislature?

CONCLUSIONS

1. No.
2. A member of the Public Employees' Retirement Association who retired or retires after June 7, 1963 and thereafter serves as a legislator may have his annuity recomputed based on such legislative service. A member of the Educational Retirement Association who retired or retires after July 1, 1963 and thereafter serves as a legislator may have his annuity recomputed based on such legislative service.
3. See Analysis.

OPINION

{*309} ANALYSIS

The first thing to note in connection with Question No. 1 is that the person has already received full credit under the Educational Retirement System for the **same** period of time for which he is claiming legislative credit. Secondly, it must be kept in mind that the answer is governed by the Retirement Reciprocity Act (Section 5-11-1, et seq.) since

legislative service credit is governed by the legislative provisions of the Public Employees' Retirement Act. Section 5-5-6.1, N.M.S.A., 1953 Compilation (P.S.). There is no separate legislative retirement system. Rather, "the lieutenant governor [and] members of the legislature and persons formerly holding these offices shall be entitled to participate in the **public employees' retirement plan** on a voluntary basis."

Turning to the Retirement Reciprocity Act we find that dual credit for the same service time was never contemplated. Section 5-11-4, N.M.S.A., 1953 Compilation (P.S.) provides that:

"In the event a member leaves a position covered by the retirement association and becomes employed in a position covered by the education retirement system, or a member **leaves** a position covered by the educational retirement system and becomes employed in a position covered by the retirement association the following provisions shall apply . . ." (Emphasis added)

The person in question did not leave the position covered by the Educational Retirement System. He remained a member and retired thereunder receiving full credit for his service. It is also to be noted that under Section 73-12-51, N.M.S.A., 1953 Compilation (P.S.) of the Educational Retirement Act, a person cannot, while a member of the system, be a member of any other State retirement program. Question No. 1 is, therefore, answered in the negative.

In answer to your second question, we point out initially that the question is three-fold - this for the reason that the legislator may have been retired under the Public Employees' Retirement System or the Educational Retirement System or he may have retired with credit from each system under the Retirement Reciprocity Act. We will discuss these possibilities in the order just mentioned.

If the person retired under the Public Employees' Retirement System, Section 5-5-6 and Section 5-5-13, N.M.S.A., 1953 Compilation (P.S.) are the controlling statutes. The former provides that if an annuitant again becomes employed by an affiliated public employer (which the legislature is insofar as legislators are concerned) he shall again become a contributing member for the purpose of acquiring additional service credit and permitting recomputation of his annuity, without change of option *{*310}* or election, upon termination of such employment. The latter section also provides for reentry as a member for the purpose of acquiring additional contributing service credit, and recomputation of his superannuation retirement annuity, without change of option. This section also provides that upon termination with the **last** affiliated public employer his annuity shall be recomputed on the basis of **the retirement law in effect at the time of his retirement**. And retirement means his first termination as a superannuation annuitant. Accordingly, if the annuitant retired prior to the effective date of the legislative retirement provisions (June 7, 1963), his annuity would not be recomputed based on legislative service thereafter. If, on the other hand, he retired or retires after the legislative provisions became effective and subsequently serves as a legislator, his annuity would be recomputed based on his legislative service.

The Retirement Reciprocity Act is applicable only to those persons who retired or who retire after its effective date (July 1, 1963). It does not affect those who retired prior to its enactment. Section 5-11-4, N.M.S.A., 1953 Compilation (P.S.). But persons who retired after its effective date or who retire in the future and subsequently become legislators may use the Retirement Reciprocity Act to become eligible to draw an annuity under the legislative provisions of the Public Employees' Retirement Act. This is because the Reciprocity Act was designed to allow the combining of credit received under each of the two retirement systems. And since credit received under the legislative provisions is Public Employees' Retirement System Credit, the annuity could be recomputed based on the legislative service. The same thing applies to an annuitant who retired pursuant to the Retirement Reciprocity Act and subsequently served as a legislator.

In your last question you ask whether a retired member of either system who is subsequently elected to the legislature may draw his annuity during his term of office. This depends on a number of factors.

First, we must note that while the legislature is an affiliated public employer insofar as legislators are concerned, legislators are not required to become members of the Public Employees' Retirement Association. If a retired member of the Association subsequently becomes a legislator, and if in that capacity he elects to again become a member of the Association, his annuity would be suspended during his term of office -- This is because of the following provision in Section 5-5-13, supra:

"Any superannuation retirement annuity payable to any retired member shall be suspended if said retired member is again employed by a public employer which is or which thereafter becomes an affiliated public employer."

As we noted in Opinion No. 65-13, a person who is retired under the Educational Retirement Act may continue to draw his annuity while he is engaged in employment covered by the Public Employees' Retirement Association. The only restriction on the retired person would be that he could not claim credit for the legislative service under the Public Employees' Retirement Act. Section 73-12-51, N.M.S.A., 1953 Compilation (P.S.).