

Opinion No. 69-01

January 9, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. Leonard T. Valdes, Executive Secretary, Public Employees Retirement Association, P.E.R.A., Building, Santa Fe, New Mexico

QUESTIONS

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1. May a District Judge, Court of Appeals Judge or Supreme Court Justice be a member of the Judicial Retirement plan?
2. May a District Judge, Court of Appeals Judge or Supreme Court Justice obtain retirement annuities from P.E.R.A. and from the Judicial Retirement Fund?
3. If the answers to the above questions are in the affirmative what steps must be taken by the District Judge, Court of Appeals Judge or Supreme Court Justice in order to become a member of P.E.R.A., while contributing to the Judicial Retirement Fund or to obtain retirement annuities from P.E.R.A., while drawing a retirement annuity from the Judicial Retirement Fund?

CONCLUSIONS

1. Yes.
2. Yes, but see analysis.
3. See analysis.

OPINION

{*2} ANALYSIS

New Mexico has several retirement systems and variations. These are the Public Employees Retirement Act, (hereinafter termed P.E.R.A.), the Judicial Retirement Act, (hereinafter termed J.R.A.), and the Educational Retirement Act, (hereinafter termed E.R.A.), Sections 5-5-1, et seq., 5-5-25, et seq., and 77-9-1, et seq., New Mexico Statutes Annotated, 1953 Compilation, as amended. In addition the Retirement Reciprocity Act contains provisions for obtaining reciprocal credit and methods of retirement where the provisions of the P.E.R.A. and the E.R.A. are being considered.

Prior to enactment of the Reciprocity Act and certain other changes in laws then applicable, our Supreme Court had occasion to consider the questions of whether a person could be a member of the P.E.R.A. and also the E.R.A., **State ex rel., Public Employees Retirement Board v. Mechem**, 58 N.M. 495, 273 P.2d 361 (1954). It concluded that one could be a member of both systems. The Court quoted with approval from Attorney General's Opinion No. 5394 (July 24, 1951) to the same effect. As above noted, various changes in the applicable statutes, including the enactment of the Retirement Reciprocity Act, would now lead to a different result insofar as **dual membership** in the P.E.R.A. and E.R.A. is concerned.

There is, however, no provision contained in either the present P.E.R.A. or the J.R.A. which excludes dual membership in these two groups.

Section 5-5-6 (1) supra, provides in part as follows:

". . . Any elected official of an affiliated public employer shall become a member of the association upon his written application filed with the retirement board; Provided that any member who becomes an {*3} elected official of an affiliated public employer shall continue to be a member."

By virtue of the provisions of Section 5-5-1 (F) supra, a District Judge, Court of Appeal Judge and Supreme Court Justice is serving an "affiliated public employer." See **State ex rel., Ward v. Romero**, 17 N.M. 88 and Opinion of the Attorney General No. 4400 (October 28, 1943) as to District Judges.

The other pertinent language contained in the P.E.R.A. (Section 5-5-6 (2) supra, reads as follows:

"2. Any employee in the service of an affiliated public employer at the time of affiliation of such public employer with the retirement association may exempt himself from membership by filing with his employer a written application for exemption, a copy of which shall be filed with the retirement board within ninety days from date of such affiliation. The retirement board may exempt from membership employees in occupational classification of a part-time, temporary, seasonal or casual nature. Excluded from membership is 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."

Under the provisions of Section 5-5-26, supra, one may exempt himself from the provisions and benefits of J.R.A. and under the Provisions of 5-5-28, supra, his right to benefits may be suspended. No other exclusions or exemptions are contained in either the P.E.R.A. or the J.R.A. which are pertinent to the matters here being considered.

There being enumerations contained in the statutes in question and dual membership not being one of them, the rule of statutory construction of **expresso unius est**

exclusio alterius is applicable. (Expression of one thing is the exclusion of another.) Southerland, **Statutory Construction** (3rd Ed.), Sec. 4915 P.413. The reasoning in the case of **State v. Mechem**, supra, is applicable and in our opinion a similar result is reached. One may be a member of both the P.E.R.A. and J.R.A. Opinion of the Attorney General No. 6209 (June 30, 1955) is affirmed.

The next question considered is that of eligibility to benefits upon retirement from both P.E.R.A. and J.R.A. The reasoning above set forth leads to the conclusion that one may receive retirement benefits under the provisions of P.E.R.A. as well as J.R.A. Chapter 112, Sec. 5, Laws of 1937 as amended, has been repealed so that the limitation therein set forth and discussed in **State v. Mechem**, supra, is not applicable.

We call your attention, however, to the language contained in Section 5-5-6 (2) (4) supra, and to 5-5-28, supra, which prohibits one who is receiving a state annuity from being a member of the Public Employees Retirement Association, and suspends payment of benefits under J.R.A. if in public employment.

The last question is mainly procedural. As noted above a District Judge, Judge of the Court of Appeals or Supreme Court Justice automatically is a member of J.R.A. unless he waives such membership pursuant to the provisions of Section 5-5-26, supra.

In order to also become a member of P.E.R.A., he must make the written application called for by Section 5-5-6 (1) supra. Thereafter contributions required by the act are deducted from the salary and the employer's matching contributions are paid.

Once such selection is made, the {*4} judge commences to receive service credit under P.E.R.A. He is also entitled to service credit for employment prior to August 1, 1947 (Section 5-5-6 (3), supra) and to delayed service credit for any periods of employment by an affiliated employer subsequent to such date by again becoming a member and entering into the agreement called for by Section 5-5-6 (3) supra. He may also receive, if eligible, the service credit allowed by Sections 5-5-6.2, supra, 5-5-7, supra, and 5-5-7.1, supra.

Note, however, that Section 5-5-13 (1), N.M.S.A., 1953 Compilation requires that contributions equaling deductions that should have been taken and contributions that should have been paid during the last five years must be paid before retirement benefits or survivor benefits may be commenced.

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