

Opinion No. 68-85

August 14, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Dolores M. Lee Retirement Analyst Public Employees Retirement Board Post Office Box 2123 Santa Fe, New Mexico

QUESTION

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Does a member of P.E.R.A. who is called into active service and withdraws his contributions without termination of employment forfeit all service credit prior to the date of withdrawal together with his military service credit and reduce it to 30 days for the period until he repays this amount or does this mean that he loses all his rights to repay for any service prior to date of withdrawal by virtue of the fact that he withdrew his contributions and that upon reemployment he starts out with only 30 days of service credit?

CONCLUSION

See analysis.

OPINION

{*136} **ANALYSIS**

Laws of 1968, Ch. 35, § 1 amended Section 5-5-9, N.M.S.A., 1953 Compilation to read in part:

"Whenever any member shall cease to be an employee of any {*137} affiliated public employer, for any reason other than his death, or retirement or whenever a member is on leave of absence because of his call into active military service, he shall be paid, on demand in writing filed with the retirement board, his accumulated deductions standing to his credit in the employees' savings fund; provided that, any member who elects to withdraw his contributions because of being called into military service shall have his service credit under the Public Employees' Retirement Act reduced to one month's credit."

Thus when a member enters the armed forces, he may withdraw his contributions from P.E.R.A., and when he does this, his time-of-service credit is reduced to one month.

Section 5-5-6 (4), N.M.S.A., 1953 Compilation provides, as relevant:

"Except as otherwise provided, should any member separate from the services of an affiliated public employer, for reasons other than becoming an annuitant, he shall thereupon cease to be a member, and the total service credit to him, at the date of his said separation from service, shall be forfeited by him. In the event the said person is reemployed by an affiliated public employer he shall again become a contributing member of the association, and the total service forfeited by him, at the time of his said last separation from service, shall be restored to his credit; Provided, that the said member returns to the employees' savings fund the full amount of accumulated deductions he may have previously withdrawn therefore, together with regular interest computed from the date of withdrawal to the date or dates of repayment."

Section 5-5-7 (2) (1), N.M.S.A., 1953 Compilation in its pertinent parts, provides:

"Any member who, on or since August 1, 1947, and during his employment by an affiliated public employer, was or shall be inducted into or entered or enters any armed service of the United States, and who has been or shall be on active duty during time of war, or other national emergency recognized by the retirement board, and who shall have been or is re-employed by any public employer within ninety [90] days following his discharge or separation from such armed service by other than dishonorable discharge * * * shall be credited with contributing service for the period of such armed service to the time of such discharge or separation or to the time that discharge or separation would have been or will be available to him, whichever occurs first. * * * During the period of such credited service rendered to the federal government and until his reemployment by any affiliated public employer his contributions to the employees' savings fund shall be suspended. In the event that he withdrew or he withdraws such balance, the credit for said service as contributing service shall be withheld until repayment of the amount withdrawn together with regular interest from date of withdrawal to date or dates of repayment."

Both of these provisions establish reaffiliation procedures and criteria. However, Section 5-5-7 (2) (1) supra, pertains specifically to persons who leave their positions because of service in the armed forces. Therefore, it is more directly in point and should be construed as the complement to Section 5-5-9, supra.

A person who has withdrawn funds as authorized by Section {~~138~~} 5-5-9, supra, is required, under Section 5-5-7, supra, to repay those monies plus interest. When he does so, he shall receive credit for contributing service during the time that he was in the armed forces.

Because he is required to reimburse P.E.R.A. for his withdrawals, it seems clear that the reduction of service credit to 30 days, as provided for in Section 5-5-9, supra, was intended by the legislature to apply only until such time as he has made the reimbursement. Otherwise, this provision would in effect, penalize a person for serving in the armed forces of this nation. Therefore, it is the opinion of this office that a member who reimburses P.E.R.A. for withdrawals made by him upon entry into the armed forces

shall receive full credit for services rendered by him prior to his induction, plus credit for time he spent in the armed forces.

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