Opinion No. 69-90

August 5, 1969

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

TO: Public Employees Retirement Association, P.E.R.A. Building, Santa Fe, New Mexico

QUESTIONS

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1. Is a delegate to the Constitutional Convention an employee of an affiliated public employer within the meaning of the Public Employees Retirement Association Act?

2. Is so, would a member who is retired and receiving benefits under the Act be suspended in compliance with Section 5-5-6 and 5-5-13 of the Public Employees Retirement Act?

3. Are the employees of the Constitutional Convention considered employees of an affiliated public employer, again within the meaning of the Public Employees Retirement Association Act?

CONCLUSIONS

1. No, see analysis.

2. No.

3. No.

OPINION

*{*142}* ANALYSIS

A Constitutional Convention has been called pursuant to Chapter 134, 1969 Session Laws. This Chapter was enacted as enabling legislation in accordance with provisions of Article XIX, Section 2 of our Constitution following compliance with the conditions precedent therein set forth. The enabling legislation provides that members of the Constitutional Convention shall receive per diem and mileage as reimbursement for their expenses of attending the convention sessions but shall not be compensated for their services as such delegate. They are not, therefore, employees under the provisions of the Public Employees Retirement Association Act. (Section 5-5-1, et seq., N.M.S.A., 1953 Comp. as amended).

However, the enabling legislation, supra, specifically provides, in part, as follows:

". . . The convention shall . . . proceed to elect a president and other officers of the convention. The convention may appoint or elect such officers, employees and assistants as it deems necessary and fix their compensation and provide for the . . . other expenses of the convention." Laws 1969, Ch. 134, § 17.

The above provision raises the question of whether an officer of the convention, if the convention authorizes compensation for his services, is an employee of an affiliated public employer. The pertinent provisions of the Public Employees Retirement Association Act, as amended by Ch. 249, Laws of 1969, supra, are as follow:

"C. 'state' means the state of New Mexico, and includes its boards, departments, bureaus and agencies;

* * *

E. 'public employer' means any public employer whose employees are included in the membership of the association, as provided in this act;

F. 'affiliated public employer' means any public employer whose employees are included in the membership of the association, as provided in this act;

*{*143}* G. 'employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer. The term includes fulltime civilian employees employed through direct appointment of designation by the governor as commander in chief of the national guard or by the adjutant general, and whose salaries are paid by the United States from funds allocated to the national guard of this state."

Section 5-5-5, supra, provides that all public employers are affiliated public employers and all employees thereof must be members of the association unless he elects to exempt himself or is exempted by the Public Employees Retirement Association Board. A rule of the board does exempt temporary employees unless they have previously been members of the Public Employees Retirement Association. Officers of the Convention who have not previously been members of the Public Employees Retirement Association, and who are compensated, are exempt.

The rule however, is different as to previous members and Section 5-5-13, supra, specifically provides that an annuitant who is employed by an affiliated public employer must have his annuity suspended during his period of employment. The legislature has attempted to make an exception to this by enactment of Chapter 233, Laws of 1969 which is not in point. See Attorney General Opinion No. 69-38, dated May 2, 1969.

It is our opinion that the Constitutional Convention is not an affiliated public employer within the meaning of the Public Employees Retirement Association Act. It is not a

member of any of the three branches of government. It is a constitutional entity created by the people separate and apart from ordinary functions of state government. See e.g. **Wells v. Bain,** 75 Pa. 39, 57 (1874); Opinion of the Attorney General No. 69-82, dated July 30, 1969. As such it is not the State of New Mexico, or one of its boards, departments, bureaus and agencies.

This is further illustrated by the fact that, although the legislature provided the money for conducting the convention, as indeed it was required to do by Article XIX, Section 2, supra, it specifically provided that the amount of compensation be paid its officers was within the sole discretion of the convention. Membership in the Public Employees Retirement Association, whether as an old member or as a suspended annuitment requires payment of a contribution of five percent of the employees compensation by the employer and a similar five per cent by the employee. Under the reasoning of State, ex rel Hudgins, v. P.E.R.A., 58 N.M. 543, 273 P.2d 743, and under the factual situation presented, this would have the effect of dictating to the convention an area of compensation of its officers -- a matter specifically and necessarily left entirely to its discretion.

We are of the opinion therefore that officers of the convention who are compensated are not considered employees of an affiliated public employer within the meaning of the Public Employees Retirement Association Act.

What has been said above answers questions 2 and 3.