

Opinion No. 70-103

December 28, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

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

QUESTIONS

FACTS

In the past, the Public Employees Retirement Association has gone by the policy that any person who has service prior to August 1, 1947, and who wishes to qualify for benefits by paying a balance of five (5) years contributions in compliance with Section 5-5-13, N.M.S.A., 1953 Comp., must first establish membership with an affiliated public employer by being so employed for a period of not less than thirty (30) days. The Public Employees Retirement Association would like to amend that policy ruling to state:

Any person who has prior service and desires to become a member shall not be considered eligible for a superannuation annuity unless he shall have completed at least one year of contributory service with an affiliated public employer and paid into the Association employee and employer contributions due as required under Section 5-5-13(1) of the Public Employees Retirement Act.

Further, in the past, members have been allowed service credit for services rendered to public schools or universities prior to August 1, 1947, as service rendered to a public employer within the meaning of the Public Employees Retirement Act, although service rendered to schools after August 1, 1947, is not creditable under the Public Employees Retirement Act except as provided under the Retirement Reciprocity Act, Sections 5-11-1 to 5-11-5, N.M.S.A., 1953 Comp.

QUESTIONS

1. Does the Public Employees Retirement Board have the authority to require such members to have at least one year of contributing service credit before being eligible for superannuated retirement?
2. May the Board allow service rendered to the schools or universities prior to August 1, 1948, to members of the Association even though they are not retiring under the Reciprocity Act.

CONCLUSIONS

1. Yes.

2. No.

OPINION

{*185} ANALYSIS

1. An administrative body such as the Public Employees Retirement Board possesses only such authority as it has been given by law. **Vermejo Club v. French**, 43 N.M. 45, 85 P.2d 90 (1938). The Public Employees Retirement Board has the statutory authority to make rules and regulations. Section 5-5-2.5, N.M.S.A., 1953 Comp. Rules and regulations of administrative bodies, such as the proposed rule, are considered valid and enforceable if they were promulgated with a reasonable {*186} relation to the intent and purposes of the act creating the administrative body. **State Corp. Comm'n v. Mountain States Tel. & Tel. Co.**, 58 N.M. 260, 270 P.2d 685 (1954). It is equally well established that administrative agency possesses no authority to abridge, enlarge, extend or modify the statutes which created the agency. **State ex rel. McCulloch v. Ashby**, 73 N.M. 267, 387 P.2d 588 (1963).

With these principles in mind, the inquiry becomes one of the reasonableness of the proposed ruling. It should be noted initially that the Public Employees Retirement Act, Sections 5-5-1, **et seq.**, N.M.S.A., 1953 Comp., contains no specific reference to or requirement for a minimum period of contributory service to a public employer for an individual to obtain credit for his prior service. The silence of the Legislature on this aspect of the retirement plan might support a conclusion that there is intended to be no minimum period of such service before one is entitled to a superannuation annuity; however, the converse is more nearly accurate as an indication of the legislative intent. Reference to the other retirement plans in this state indicates that the Legislature intends that some minimum period of such service be established as a prerequisite to eligibility for such an annuity.

When an individual wishes to retire pursuant to the Retirement Reciprocity Act, Sections 5-11-1 to 5-11-5, **supra**, he must be in the employment of the particular retirement plan for at least one (1) year immediately prior to his retirement pursuant to the Act. Section 5-11-4(A), **supra**. Where an individual wishes to retire under the Educational Retirement Act, Sections 77-9-1 through 77-9-45, N.M.S.A., 1953 Comp., he must have earned at least one (1) year of service credit immediately prior to the date of retirement. Section 77-9-22(A) (2), **supra**. Under other circumstances where he is returning to employment, the individual must be employed for not less than one (1) year. See Section 77-9-24(B), **supra**.

In light of these comparable retirement provisions, the proposed ruling of the Public Employees Retirement Board would be reasonable. This office is aware of the probability that the proposed ruling may affect certain individuals. Therefore, we suggest that prior to the effective date of the proposed ruling the Board provide adequate notice to all members of the Public Employees Retirement Association who may be so affected by the ruling.

2. "Prior Service" within the meaning of the Public Employees Retirement Act means "service rendered prior to August 1, 1947, as an employee of any public employer." Section 5-5-1(N), N.M.S.A., 1953 Comp. A "public employer" is defined as "the state of New Mexico or any municipality in the state." Section 5-5-1(E), N.M.S.A., 1953 Comp. Schools and universities are not included within this definition. Therefore, the Public Employees Retirement Board may now allow credit for service prior to August 1, 1947, rendered to schools or universities.

By: James C. Compton, Jr.

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