

Opinion No. 79-05

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OPINION OF: Jeff Bingaman, Attorney General

BY: Andrea Buzzard, Assistant Attorney General

TO: Mr. Richard A. Folmar, Assistant Director, New Mexico Legislative Council, State Capitol, Santa Fe, New Mexico 87503

RETIREMENT

A legislator who is retired and drawing an annuity under the provisions of the Educational Retirement Act may also draw an annuity pursuant to the legislative provisions of the Public Employees' Retirement Act.

QUESTIONS

May a legislator who is retired and drawing an annuity under the provisions of the Educational Retirement Act, also draw an annuity pursuant to the legislative provisions of the Public Employees' Retirement Act?

CONCLUSIONS

Yes.

ANALYSIS

Prior to a 1977 amendment to Section 10-11-9 NMSA 1978, no person receiving an annuity from the Educational Retirement Act could become a member of the Public Employees' Retirement Association. The 1977 amendment exempted from this prohibition legislators who have retired pursuant to the Educational Retirement Act. Section 10-11-9(B), *supra*, provides, in part:

"B. Excluded from membership is any person, **other than a person who is entitled to participate under the provisions of Section 10-11-10 NMSA 1978**, 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 Sections 29-4-1 through 29-4-11 NMSA 1978." (Emphasis added.)

The underlined portion of subsection B indicates the 1977 amendment. Persons entitled to participate under the provisions of Section 10-11-10 NMSA 1978 are the Lieutenant Governor, members of the legislature and persons formerly holding these offices. Thus, a legislator who is an annuitant under the educational retirement system is not excluded

from membership in the Public Employees' Retirement Association and is, therefore, entitled to become a member of the Public Employees' Retirement Association.

Nor does the Educational Retirement Act prohibit a legislator from becoming a member of the Public Employees' Retirement Association and drawing an annuity pursuant to Section 10-11-10, **supra**, the legislative provisions of the Public Employees' Retirement Act. Section 22-11-16 NMSA 1978 of the Educational Retirement Act provides:

"Except as otherwise provided in the Educational Retirement Act [22-11-1 to 22-11-45 NMSA 1978], being a regular member shall be a condition of employment and shall exclude membership and participation in any other state retirement program."

{*11} Members of the Educational Retirement Act are employees of specified agencies and institutions. Section 22-11-1 NMSA 1978. When a legislator is retired and is no longer an employee, he is not a regular member of the Educational Retirement Act. He is not, therefore, excluded from membership and participation in another state retirement program. He may, accordingly, receive benefits from both the educational retirement system and the public employees' retirement system.

Although previous opinions of the Attorney General have concluded that a person could not draw benefits from both the Educational Retirement Act and the Public Employees' Retirement Act, the basis, in part, of those conclusions was the exclusion from membership provision set forth in Section 10-11-9, **supra**. See Opinion of the Attorney General No. 65-13, issued January 26, 1965 and Opinion of the Attorney General No. 65-190, issued September 29, 1965. That provision was amended after those opinions were issued.

To the extent that Opinions of the Attorney General No. 65-13 and No. 65-190 rely upon Section 22-11-16, **supra**, in support of the conclusion that a person retired under the Educational Retirement Act cannot become a member of the Public Employees' Retirement Act, such reliance is misplaced for the reason that an annuitant is not a member of the Educational Retirement Act.

ATTORNEY GENERAL

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