Opinion No. 87-37

July 29, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Alan D. Morgan, Superintendent of Public Instruction, Department of Education, Education Building, Santa Fe, New Mexico 87501-2786

QUESTIONS

May Mr. Michael Granito, retired pursuant to the provisions of the Public Employees' Retirement Act, resume employment with the Department of Education without suspension of retirement benefits?

CONCLUSIONS

No.

FACTS

Mr. Michael Granito purportedly retired effective January 1, 1987, pursuant to the provisions of the Public Employees' Retirement Act ("PERA"), by terminating his employment with the Department of Finance and Administration on December 31, 1986. Mr. Granito resumed employment with the Department of Education, Division of Vocational Rehabilitation, on January 5, 1987, and became a member of the educational retirement system as a "provisional member." Both he and his employer, the Department of Education, have remitted contributions to the educational retirement fund in the amounts that the Educational Retirement Act ("ERA") requires.

ANALYSIS

When an employee purports to retire from a public employer and then soon thereafter returns to public employment, there is a threshold question whether the retirement was a valid relinquishment of public employment. See Opinion of the Attorney General No. 87-14 (issued March 24, 1987). For reasons discussed later, we find this situation indistinguishable in pertinent respects from that discussed in Opinion of the Attorney General No. 87-14 (issued March 24, 1987) and conclude accordingly.

Section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.) provides:

Except as provided in Subsection E of Section 10-11-9 NMSA 1978, any superannuation retirement annuity payable to an annuitant shall be suspended if the annuitant is again employed by a public employer which is or which thereafter becomes

an affiliated public employer. The annuitant shall again become a contributing member, **without right of exemption**, as of the date of such employment or the date his public employer becomes an affiliated public employer, whichever last occurs....

(emphasis supplied).[1] "Public employer" means "the state of New Mexico or any municipality in the state excluding any agency or institution and the like eligible under the Educational Retirement Act." Section 10-11-1(E) NMSA 1978 (1986 Cum. Supp.) While the Department of Education is an employer whose employees are eligible for membership under the Educational Retirement Act, the Department of Education is also an affiliated public employer for those employees who may and do elect retirement coverage under the Public Employees' Retirement Act. Section 22-11-17(D) NMSA 1978, as amended by Laws 1987, chapter 208. See Opinion of the Attorney General No. 87-14 (issued March 24, 1987). The emphasized phrase "without right of exemption" in section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.) means that exemptions from membership, which members who are not annuitants might exercise, are not available to annuitants who resume public employment, apart from that permitted those who, after bonafide retirement, become elected officials. See also section 10-11-9.2 NMSA 1978 (1986 Cum. Supp.) (exemption for undersheriffs). The exemptions not available to annuitants include: employment as to which the public employer might otherwise make contributions to a private company providing retirement benefits for the employee; employment with a nonaffiliated public employer which thereafter becomes an affiliated public employer; and part-time and temporary employment. Section 10-11-9(B) NMSA 1978; PERA Rule 400, §§ 400.10(A)(3) and 400.20(4).

Section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.) evidences the legislature's intent to proscribe the practice vernacularly referred to as "double dipping," meaning the receipt of retirement benefits in addition to a full salary. See Baker v. Reagan, 114 A.D.2d 187, 498 N.Y.S.2d 557 (A.D.3 Dept. 1986). The Court of Appeals of New York in Baker v. Regan, 68 N.Y.2d 335, 509 N.Y.S.2d 301 (Ct. App. 1986), stated:

Our Legislature has for over a half century evinced a strong public policy in favor of the suspension of retirement benefits of a person who after retiring accepts an office in the civil service of the State. [Citations omitted]. Although exceptions have been made to this general proscription, it is clear that such exceptions were enacted for limited purposes and were not meant to abrogate or dilute the longstanding and overriding State policy to prohibit the receipt of retirement benefits and salary at the same time which would constitute an abuse of the public fisc.

509 N.Y.S.2d at 302. The New Mexico legislature has evinced the same strong public policy in favor of suspension of retirement benefits in section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.).

The Supreme Court of New Mexico also articulated this policy in State v. Foraker, 64 N.M. 71, 323 P.2d 1107 (1958), a mandamus proceeding that retired teachers brought to compel continuation of retirement benefits notwithstanding their resumption of

employment with the public schools. The Court refused to permit continuation of retirement benefits. "A teacher, by accepting the [retirement] benefits, removes himself completely from the public school system of the state. To construe the term, [retire from active service], otherwise could well lead to the pyramiding of income, something the teaching profession would not approve, and something not contemplated by the legislature." 64 N.M. at 72, 323 P.2d at 1108.

Despite this strong public policy against double dipping, an issue to be addressed is whether section 22-11-17(D) NMSA 1978, as amended by Laws 1987, chapter 208, permits PERA annuitants, who resume public employment with the Department of Education to select retirement coverage under the Educational Retirement Act and thereby exempt themselves from coverage under the Public Employees' Retirement Act, to "double dip". Section 22-11-17(D) NMSA 1978, as amended, recites, in part:

A provisional member employed by... the department of education...shall have the option of **qualifying for coverage** under either the Educational Retirement Act or the public employees' retirement association of New Mexico. This option shall be exercised by filing a written election with both the educational retirement director and the director of the public employees' retirement association of New Mexico. This election shall be made within six months after employment and shall be irrevocable regardless of subsequent employment or reemployment in any administrative unit enumerated in this subsection. Until this election is made, the provisional member shall be covered and shall be required to make contributions under the Educational Retirement Act.

(emphasis supplied).[2] The ability of provisional members of the Department of Education to "qualify for [retirement] coverage" either under ERA or under PERA must be read and interpreted in the context of the prohibition against state employees receiving retirement benefits from both systems.

Both PERA and ERA contain exclusions from membership and participation in other state retirement programs. Sections 10-11-9 NMSA 1978; 22-11-16 NMSA 1978. Because of these mutual exclusions from membership, the Attorney General of New Mexico correctly opined in 1960 that a person cannot draw retirement benefits from both the Public Employees' Retirement Act and the Teachers' Retirement Act, now the Educational Retirement Act. See Opinion of the Attorney General No. 60-164 (issued Sept. 21, 1960) (discussed in Opinion of the Attorney General No. 65-13 (issued Sept. 26, 1965)). Consequently, PERA annuitants who the Department of Education subsequently employs and who elect to participate in the educational retirement system by making contributions to that system do not "qualify for [retirement] coverage." The educational retirement board's practice is to refund to such ERA members ---- annuitants of PERA ---- their member contributions when they terminate employment. The educational retirement board does not regard such contributing ERA members as acquiring any service credit for purposes of educational retirement benefits.

Lacking the ability to obtain educational retirement benefits, PERA annuitants that the Department of Education employs have no meaningful option to qualify for coverage

under the Educational Retirement Act. Statutes will not construed to require a useless act. State v. Doe, 95 N.M. 88, 619 P.2d 192 (Ct. App. 1980). Nor will statutes be construed in a manner leading to absurd, inequitable, or unreasonable results. See, e.g., State ex rel. Board of County Commissioners of Bernalillo County v. Jones, 101 N.M. 660, 687 P.2d 95 (1984); State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982). Where adherence to literal use of words would lead to injustice, absurdity, or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others. See, e.g., National Council on Compensation Ins. v. New Mexico State Corporation Commission, 103 N.M. 707, 712 P.2d 1369 (1986); State v. Nance, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039 (1967). The object of section 22-10-17(D) NMSA 1978 is to permit a provisional member to select retirement coverage and attendant retirement benefits either of ERA or of PERA, but not of both. Having no option to elect educational retirement coverage within the contemplation of this section, Mr. Granito may not purport to do so for the sole purpose of effecting an exemption from PERA membership to permit receipt of benefits while drawing full salary from state employment. Our interpretation accords with the language contained in section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.), withdrawing from annuitants any "right of exemption," and accords with long-standing public policy prohibiting receipt of public retirement benefits while drawing full salary from state employment.

Finally, the recodification of the Public Employees' Retirement Act, Laws 1987, chapter 253, effective July 1, 1987, requires no different result. Chapter 253, section 2 defines "public employer" as "the state,...including the boards, departments, bureaus and agencies of a public employer." The term "affiliated public employer" is defined to include the state. Chapter 253, section 3(A) provides, in part: "Except as may be provided for in...the Educational Retirement Act..., each employee and elected official of an affiliated public employer shall be a member of the association unless excluded from membership in accordance with Subsection B of this section." Section 22-11-17(D) NMSA 1978 provides no exemption from PERA membership to PERA annuitants that the Department of Education subsequently employs. Such annuitants do not have the option to qualify for coverage under the Educational Retirement Act within this section's meaning, purpose, and intent, and such Act does not contemplate their membership for benefit purposes.

Inasmuch as Mr. Granito may not use section 22-11-17(D) NMSA and the option contained therein to avoid suspension of annuity, the next question is whether section 10-11-23 NMSA 1978 permits Mr. Granito to earn the maximum amount stated therein without suspension of annuity. That section provides, in part:

Notwithstanding the provisions of Section 10-11-22 NMSA 1978, any annuitant who enters into employment with an affiliated public employer on or after July 1, 1973, and who earns in a calendar year not over seventy-five percent of the highest maximum earnings allowed a retired worker under the federal social security program may continue to draw the same monthly annuity without suspension. No contribution will be

required of any such annuitant nor shall recomputation of benefits be made for such service.

PERA, historically, permits annuitants who enter into subsequent public employment to draw their annuities until they reach the maximum allowed, which is $6,120.00, notwithstanding that they later exceed this maximum. See Laws 1987, chapter 253, section 8(C) (where retired members are "reemployed by" an affiliated public employer; also increasing the maximum to $8,160.00). We need not decide herein, however, whether this practice comports with statutory law or legislative intent. Cf. ERB Rule VII B(1) ("Above rules shall not be construed to exempt the first $4800 of earnings from coverage, consequently when a retired member enters into a contract or other agreement which provides for cumulative earnings during the fiscal year to exceed the $4800, his retirement benefits shall cease on the day preceding his date of reemployment."). Both section 10-11-23 NMSA 1978, in using the language "enters into employment," and section 8(C) of chapter 253, in using the language "reemployed by," suggest that the permitted earnings exemption applies only where the initial retirement was based on a permanent separation from employment with an affiliated public employer. We do not believe that Mr. Granito "retired" as that term is used under the statutes.

Mr. Granito, in applying for retirement benefits, did not do so with the "intent of terminating permanently [his] employment with a public employer," as recited in his final application for annuity. While his employing state agencies are different, the "state", nevertheless, employs Mr. Granito. The fact of different state agencies, in practical or legal effect, does not distinguish this situation from that upon which we opined in Opinion of the Attorney General No. 87-14 (issued March 24, 1987). Accordingly, we conclude that the exemption permitted by section 10-11-23 NMSA 1978 is not available in this situation. To conclude otherwise could invite abuse, such as "retirements" in the context of state agency job changes based solely on the ability to earn, for a limited period of time which may now be increased by chapter 253, a salary plus a pension.

We advise, therefore, that Mr. Granito's retirement benefits be terminated; that his membership in PERA resume effective January 5, 1987; and that Mr. Granito reimburse PERA the amount of retirement benefits paid while the Department of Education employed him. Additionally, PERA contributions are owed, representing amounts that would have been paid to PERA had continued membership in PERA occurred as required by law. Contributions paid to ERA may be transferred to PERA and applied to this indebtedness.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Unless otherwise reflected in this opinion, citations to the Public Employee's Retirement Act and PERA rules are to those provisions in effect before July 1, 1987.

n2 The 1987 amendment to section 22-11-17(D) NMSA 1978 added the following language in the third sentence of that subsection, after the word "employment": "and shall be irrevocable regardless of subsequent employment or reemployment in any administrative unit enumerated in this subsection." This amendment has no bearing upon the issues pertinent to this opinion.