

Opinion No. 87-38

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 Ms. Anna Ulrich, retired pursuant to the provisions of the Educational Retirement Act, resume employment with the Department of Education without suspension of her educational retirement benefits?

CONCLUSIONS

No.

FACTS

Ms. Anna Ulrich purportedly retired pursuant to the provisions of the Educational Retirement Act on or about June 30, 1986, from her employment with the Albuquerque Public Schools ("APS"). Ms. Ulrich became employed with the Department of Education on or about September 29, 1986. Ms. Ulrich filed an application for membership with the public employees' retirement association ("PERA") shortly after commencing employment with the Department of Education, and, since that date, she and her employer have remitted member and employer contributions to PERA.

It is our understanding that Ms. Ulrich does not hold a current teaching certificate. At the time she commenced employment, her position did not require that she hold such certificate. Her position now so requires.

ANALYSIS

Section 22-11-25(A) NMSA 1978 provides, in part:

A member retired pursuant to the provisions of the Educational Retirement Act [22-11-1 to 22-11-45 NMSA 1978] may remove himself from retirement status by returning to employment. A reemployed member shall make regular contributions pursuant to the Educational Retirement Act. Upon termination of reemployment, the member shall be eligible for retirement benefits again based upon all service-credit acquired....

The Educational Retirement Act defines "employment" as "employment by a local administrative unit which qualifies a person to be a member." The term "local administrative unit" includes the Department of Education. Section 22-11-2(B), (C), and (F) NMSA 1978.

A "regular" member under the Educational Retirement Act ("ERA") is a person employed by the Department of Education "holding a standard or substandard certificate issued by the state board at the time of commencement of such employment." Section 22-11-2(B)(3) NMSA 1978. A "provisional member" is a person not eligible to be a regular member but employed by an entity designated in subsection B. Section 22-11-2(C) NMSA 1978. An individual who is a "regular member" must participate in the Educational Retirement Act, which participation "exclude[s] membership and participation in any other state retirement program". Section 22-11-16 NMSA 1978.

For "provisional members" that the Department of Education employs, section 22-11-17(D), as amended by Laws 1987, chapter 208, provides, 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 made contributions under the Educational Retirement Act.¹

Were Ms. Ulrich a "regular member," she would be required to participate in the educational retirement system and her educational retirement benefits would, without question, suspend. If she were a "provisional member," however, the issue would be whether section 22-11-17(D) NMSA 1978 permits Ms. Ulrich the "option of qualifying for [retirement] coverage" under the Public Employees' Retirement Act, thereby permitting her to continue to receive educational retirement benefits as well as full salary from her employment with the Department of Education, a practice vernacularly referred to as "double dipping."

We stated in Opinion of the Attorney General No. 87-37 (issued July 29, 1987), that the practice of double dipping is contrary to the long- standing public policy prohibiting receipt of public retirement benefits and public salary at the same time, and constitutes "an abuse of the public fisc." *Baker v. Reagan*, 68 N.Y.2d 335, 509 N.Y.S.2d 301, 302 (Ct.App. 1986). The Supreme Court of New Mexico has refused to permit continuation of retirement benefits to retired teachers who had resumed employment with the public schools, characterizing the desired continuation of benefits as "a pyramiding of income, something which the teaching profession would not approve, and something not contemplated by the legislature." *State v. Foraker*, 64 N.M. 71, 72, 323 P.2d 1107, 1108

(1958). The legislature has evidenced this policy to prohibit double dipping in section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.)² (in the case of PERA annuitants) and in section 22-11-27(D) (in the case of ERA annuitants), the latter section stating, "No member shall be on a retirement status while engaged in employment." Moreover, despite an apparent "option to qualify for [retirement] coverage," section 10-11-9(B) NMSA 1978 excludes from PERA membership 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....

Ms. Ulrich, as a person receiving an annuity from ERA, is excluded from membership in PERA. Although both Ms. Ulrich and the Department of Education have remitted contributions to PERA, such contributions are not allowed.

We stated in Opinion of the Attorney General No. 87-37 (issued July 29, 1987) that the option permitted by section 22-11-17(D) NMSA 1978 contemplates a meaningful option to obtain retirement benefits from the retirement system in whose favor the option is exercised. That section does not contemplate a useless act or a manipulative election of coverage under PERA for the sole purpose of enabling the state employee to engage in "double dipping." Employment with the Department of Education "qualifies" a person to be a member of ERA and is "employment" within the meaning of sections 22-11-25, 22-11-27, and 22-11-2(F) NMSA 1978. Accordingly, suspension of Ms. Ulrich's educational retirement benefits and her participation in the educational retirement system are required.

Opinion of the Attorney General No. 65-13 (issued Jan. 26, 1965) does not conflict with our conclusion here. There, Attorney General Boston E. Witt concluded that a member retired under the Educational Retirement Act could continue to receive retirement benefits while employed in a state position normally covered by the Public Employees' Retirement Act. In that opinion, the annuitant assumed employment in a state position "outside the educational retirement coverage," and no proscription against payment of educational retirement benefits could be found in the Educational Retirement Act.³

Finally, the recodification of the Public Employees' Retirement Act, Laws 1987, chapter 253, effective July 1, 1987, requires no different result. Although not containing the express exclusion from membership of individuals receiving an annuity from any other state retirement system, chapter 253, section 3 achieves this purpose. Section 3 recites, in part: "A. 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." In the situation at hand, the Educational Retirement Act provides for Ms. Ulrich's membership in ERA. Therefore, chapter 253, section 3 does not require Ms. Ulrich's membership in PERA. Further, to implement chapter 253, PERA adopted rules on June 5, 1987, that exclude ERA annuitants from PERA membership.

We advise, therefore, that Ms. Ulrich must become a member of ERA. Sections 22-11-25 and 22-11-27(D) NMSA 1978 and educational retirement board rule VII(B)(1) (3rd unnumbered paragraph) require that her retirement benefits must cease. Further, Ms. Ulrich must reimburse to ERA the amount of retirement benefits paid while the Department of Education employed her and any paid during the months of July and August in accordance with educational retirement board rule V(C)(2). Additionally, ERA contributions are owed, representing amounts that would have been paid to ERA had ERA membership occurred as required by law. Contributions paid to PERA may be transferred to ERA and applied to this indebtedness.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) The 1987 amendment to section 22-11-17(D) NMSA 1978 added the 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.

[n2](#) Unless otherwise reflected in this opinion, citations to the Public Employees' Retirement Act are to those provisions in effect before July 1, 1987.

[n3](#) While the conclusion reached in opinion no. 65-13 is distinguishable from the present situation, its validity is doubtful. No public policy rationale supports treating retired teachers and administrators (ERA annuitants) differently from other retired public employees (PERA annuitants) where the issue is the ability to retain a pension upon resumption of public employment with an affiliated public employer whose employees are covered solely under PERA. Such conclusion gives ERA annuitants a privilege to retain a public pension that PERA annuitants would not share. We also question the continued vitality of this opinion in light of Laws 1987, chapter 253, the PERA recodification. A "state member" excluded from PERA because of ERA annuitant status may, nevertheless, be engaged in "employment" within the meaning of ERA because of the policy on membership articulated in section 3(A) chapter 253:

Except as may be provided for in the Volunteer Firefighters Retirement Act, the Judicial Retirement Act, the Magistrates Retirement Act, the Educational Retirement Act and the provisions of Sections 29-4-1 through 29-4-11 NMSA 1978 governing the state police pension fund, 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.

The initial clause "excepting" certain employees from PERA membership requirements suggests their inclusion as members in the other state retirement systems mentioned therein.