

**Opinion No. 87-66**

October 26, 1987

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Andrea R. Buzzard, Assistant Attorney General

**TO:** Mr. Leonard T. Valdes, Executive Secretary, Public Employees' Retirement Ass'n,  
P.O. Box 2123, Santa Fe, New Mexico 87504-2123

**QUESTIONS**

May a state general member retire under the new 2 1/2% formula in the circumstances described below? In all cases, the PERA member's termination complies with PERA Rule 700, and the actual retirement date is November 1, 1987, or a subsequent first day of the month.

1. The PERA member experiences the following prior to July 1, 1987:

a. The PERA member experiences a break in service as follows:

- i. Approximately one month beginning before the first session of the 1987 Legislature
- ii. Approximately one month beginning during the first session of the 1987 Legislature
- iii. Approximately one month beginning after the first session of the 1987 Legislature
- iv. Approximately six months beginning before the first session of the 1987 Legislature
- v. Approximately two years beginning before the first session of the 1987 Legislature

b. The PERA member takes sick leave as follows:

- i. Approximately one month beginning before the first session of the 1987 Legislature
- ii. Approximately one month beginning during the first session of the 1987 Legislature
- iii. Approximately one month beginning after the first session of the 1987 Legislature
- iv. Approximately six months beginning before the first session of the 1987 Legislature

c. The PERA member takes annual leave as follows:

- i. Approximately one month beginning before the first session of the 1987 Legislature

ii. Approximately one month beginning during the first session of the 1987 Legislature

iii. Approximately one month beginning after the first session of the 1987 Legislature

d. The PERA member takes administrative leave with pay as follows:

i. Approximately one month beginning before the first session of the 1987 Legislature

ii. Approximately one month beginning during the first session of the 1987 Legislature

iii. Approximately one month beginning after the first session of the 1987 Legislature

e. The PERA member takes administrative leave without pay as follows:

i. Approximately one month beginning before the first session of the 1987 Legislature

ii. Approximately one month beginning during the first session of the 1987 Legislature

iii. Approximately one month beginning after the first session of the 1987 Legislature

iv. Approximately six months beginning before the first session of the 1987 Legislature

f. The PERA member takes paid educational leave as follows:

i. Approximately one month beginning before the first session of the 1987 Legislature

ii. Approximately one month beginning during the first session of the 1987 Legislature

iii. Approximately one month beginning after the first session of the 1987 Legislature

iv. Approximately six months beginning before the first session of the 1987 Legislature.

g. With respect to the situation described in 1a, above, would there be any difference if the State employee returned to the same vis-a-vis a different State agency?

2. With respect to each situation described in 1, above, would your answer differ if "April 9, 1987" were substituted for "first session of the 1987 Legislature"?

3. With respect to each situation described in 1, above, would your answer differ if "July 1, 1987" were substituted for "first session of the 1987 Legislature"?

4. Without consideration of any other factor, the PERA member is in the following status from October 1 until 8:00 a.m. on October 16, 1987:

a. Sick leave

b. Annual leave

c. Administrative leave with pay

d. Paid educational leave

5. The person is a vested former member of PERA and has been employed by a public educational institution such that the person is legitimately a current contributing member of ERA, but leaves that institution and returns to employment as a PERA member (having qualified for reciprocity retirement) and seeks reciprocity retirement with the PERA portion to be paid at 2 1/2% as follows:

a. Before the first session of the 1987 Legislature

b. During the first session of the 1987 Legislature

c. After the first session of the 1987 Legislature

d. Substitute "April 9, 1987" for "first session of the 1987 Legislature" in 5a, 5b and 5c, above

e. Substitute "July 1, 1987" for "first session of the 1987 Legislature" in 5a, 5b and 5c, above

f. Substitute "October 1, 1987" for "first session of the 1987 Legislature" in 5a, 5b and 5c, above

6. The person is a vested former member of PERA and has been a judge and contributing member under the Judicial Retirement Act, but then leaves the bench and returns to employment as a PERA member (having qualified for reciprocity retirement) and seeks reciprocity retirement with the PERA portion to be paid at 2 1/2% after returning to PERA employment at each of the times described in 5a through 5f, above.

7. Would it make any difference to your response to the situations described in 5a through 5f or 6a through 6f if:

a. The PERA member sought to terminate employment at 8 a.m. on October 16, 1987 and retire as soon as possible thereafter

b. The PERA member worked 6 months prior to terminating and seeking to retire

c. The PERA member worked 1 year prior to terminating and seeking to retire

## **CONCLUSIONS**

1(a). A PERA member experiencing a break in service in any of the circumstances described in the question does not qualify for the exception to the three-year service requirement in Section 10-11-8(F) NMSA 1978.

1(b). So long as a member uses sick leave properly, within the limits of, and in accordance with, the State Personnel Board Rules, the member's service credit for purposes of state general member coverage plan 2 is not affected thereby.

1(c). So long as a member uses annual leave within the limits of, and in accordance with, the State Personnel Board Rules, the member's service credit for purposes of state general member coverage plan 2 is not affected thereby.

1(d). See analysis.

1(e). See analysis.

1(f). See analysis.

1(g). In the circumstances described in question 1(a), those members experiencing such breaks in service will not qualify for the exception, whether they returned to employment with their previous state-agency employers or with different state-agency employers.

2. No.

3. No.

4. See analysis.

5. Vested former members returning to PERA employment in the circumstances of the question are not entitled to the exception to the three-year service requirement continued in Section 10-11-8(F) NMSA 1978.

6. Such a vested former member resuming employment in a position covered by PERA is not entitled to the exception contained in Section 10-11-8(F) NMSA 1978.

7. No. Section 10-11-8(F) NMSA 1978 requires service under state general member coverage plan 2 for three years to obtain the benefits of that plan.

### **ANALYSIS**

These questions arise in the context of state general member coverage plan 2, applicable after September 30, 1987, and we answer the questions in that context. Any similar question involving municipal employees also should be addressed to this Office.

The statute primarily pertinent is Section 10-11-8(F) NMSA 1978, which provides:

F. The pension of a member who has three or more years of credited service under each of two or more coverage plans shall be determined in accordance with the coverage plan, from among the two or more coverage plans which produces the highest pension. The pension of a member who has credited service under two or more coverage plans but who has three or more years of credited service under only one of those coverage plans shall be determined in accordance with the coverage plan in which the member has three or more years of credited service and any difference between the actuarial present value of the resulting pension and the member's contributions shall be paid to the annuitant, provided, however, that if the credited service is acquired under two different coverage plans applied to the same affiliated public employer as a consequence of an election by the members or a change in the law which results in the application of a coverage plan with a greater annuity, the greater annuity shall be paid a member retiring from the public employer under which the change in the coverage plan took place regardless of the amount of credited service under the coverage plan producing the greater annuity. The provisions of each coverage plan for the purpose of this subsection shall be those in effect at the time the member ceased to be covered by the coverage plan. Credited service for the purposes of this subsection shall be only personal service rendered an affiliated public employer and credited to the member under the provisions of Subsection A of Section 4[10-11-4A NMSA 1978] of the Public Employees Retirement Act. Service credited under any other subsection of the Public Employees Retirement Act shall not be used to satisfy the three-year credited service requirement of this subsection.

This statute's general rule is that a retiring member who has coverage under two different coverage plans will receive benefits calculated under the provisions of the better coverage plan if the member has three years of credited service under the better coverage plan. If not, the member will receive benefits calculated under the provisions of the lesser coverage plan. The only exception to this rule is where the retiring member acquires credited service under two coverage plans "applied to the same affiliated public employer as a consequence of... a change in the law which results in the application of a coverage plan with a greater annuity." This exception must be strictly construed, because it departs from the general rule; financially impacts PERA as imminent retirees make little contribution toward the greater benefits; and envisions potential manipulation and abuse as demonstrated by PERA's experience with the "loopholers" or "job jumpers."

You inquire whether a member may retire under the 2 1/2% formula provided by coverage plan 2 in various circumstances. Your first inquiry concerns breaks in service. By "break in service," we understand you to mean that the member ceased to be covered by state general member coverage plan 1 for an unspecified period of time and is an inactive vested member. We further understand the question to mean that termination of employment occurred before the times reflected; that the member resumed coverage under state general member coverage plan 2 or under plans 1 and 2 sometime thereafter; and that the member will retire effective November 1, 1987, or thereafter.

The 1987 legislature enacted chapter 253 providing state general member coverage plan 2. Chapter 253 was approved April 9, 1987, and became effective July 1, 1987. An inactive vested member is a former member who has at least five years of credited service, who terminated employment, and left his contributions on deposit until such time as he might qualify to receive a retirement benefit. Section 10-11-9 NMSA 1978. Subsection B of that section provides that "[e]ligibility for normal retirement, amount of normal retirement pension... shall be determined according to the provisions of the Public Employees' Retirement Act at time of termination of membership."

The question is whether such a member who terminated state employment, for example, on January 1, 1985, or on June 1, 1987, may return to state employment, on September 30, 1987, and retire under the 2 1/2% formula of state general member coverage plan 2 or secure entitlement to a future retirement benefit under the 2 1/2% formula without meeting the three-year service requirement. Such members will not qualify for the exception to the three-year service requirement. The exception's purpose is to advantage long-term, continuously employed state employees who, through no conduct other than continuous employment with their employer, have become accorded the benefit of an amendment to the retirement laws.

We recognize that some inactive members may have left the service for legitimate reasons and returned to complete their careers in state government. Where those members returned and remained employed continuously at least three years before coverage plan 2 becomes applicable to them, such coverage under plans 1 and 2 being applied to the same affiliated public employer, they would qualify for the exception. This date is consistent with the three-year service requirement in Section 10-11-8(F) NMSA 1978 and is consistent with Section 10-11-8(C)(4) NMSA 1978, which permits recomputation of a retiree's benefit based on the law in effect at the time of the second retirement if a retiree resumes public employment, works three years, and retires a second time.

In answer to question 1(a), a PERA member experiencing a break in service in any of the circumstances described in question 1(a) does not qualify for the exception to the three-year service requirement contained in Section 10-11-8(F) NMSA 1978.

We respond next to questions 1(b) and 1(c). State members covered by the State Personnel Board Rules accumulate sick leave at the rate of 3.69 hours per pay period, which is to be used for medical treatment or illness, and which may be accrued without limit. SPB Rule 13.2. State members covered by the State Personnel Board Rules accumulate annual leave at the rate of 4.61 hours per pay period, which may be accrued to a maximum of 240 hours per year. SPB Rule 13.1. PERA requires contributions upon salary payments made through continuation of the payroll to employees who are on sick or annual leave.

Service credit as reflected upon PERA records is not altered because an employee is on sick or annual leave, which is paid leave earned at the specified rates. Sick leave is limited to those periods of actual illness, and annual leave is limited in hours. Section

30-23-2 NMSA 1978, in proscribing the payment of public funds for personal services not rendered, excepts payments that are "intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or other lawfully authorized purposes." This statute recognizes that payment for personal services may include salary payment during authorized sick or annual leave periods. Therefore, so long as the member uses sick or annual leave properly and within the limits of, and in accordance with, the State Personnel Board Rules, the member's service credit for purposes of state general member coverage plan 2 is not affected thereby. It is immaterial whether such leave is taken before the dates reflected in the question.

We respond next to questions 1(d) and 1(e). State Personnel Board Rule 13.5 provides that "[t]he Director or an employer may authorize an incumbent leave with pay, under unusual circumstances, when it is in the best interests of the state to do so for a period not to exceed five consecutive days without the prior approval of the Director." Administrative leave with pay, when granted in accordance with the provisions of this rule requiring "unusual circumstances" and that the leave be "in the best interests of the state," should not occasion a break in service or affect a member's service credit for purposes of state general member coverage plan 2. Such leave would not exceed five days and would be rare.

If, however, the employer grants such leave to enable a member to obtain the 2 1/2% benefit, such leave is not for a purpose that SPB rule 13.5 contemplates. Section 10-11-8(F) NMSA 1978 does not expressly permit members to render "personal service" by using administrative leave with pay so as to qualify those members for the exception to the three-year service requirement. Payments to employees as "wages, salary or remuneration for personal services" may not be made unless service has been "rendered," Section 30-23-2 NMSA 1978, except for payments covering "absences from employment... for other lawfully authorized purposes." Neither SPB Rule 13.5 nor Section 10-11-8(F) NMSA 1978 authorizes leave with pay to obtain the exception's benefit.

We addressed the question of administrative leave without pay in our letter dated June 16, 1987, in which we advised that a member may not secure leave without pay status and thereby extend his employment beyond September 30, 1987, to retire at the 2 1/2% formula. PERA and this Office must scrutinize individually the situations involving a break in service attributable to leave without pay. We specifically advise, however, that a member may not qualify for the exception by rescinding an earlier termination and securing reinstatement on leave without pay status to extend employment beyond September 30, 1987, and thereby attempt to qualify for the 2 1/2% benefit.

We respond next to question 1(f). The purpose of educational leave is "to permit an incumbent to pursue special training related to the incumbent's employment and which will improve the incumbent's competence and capacity in the service." SPB rule 13.6(A). The purpose is not to enable a member to extend his employment so as to qualify for the exception to the three-year service requirement for the 2 1/2% benefit. When an

incumbent is granted paid educational leave in excess of 100 consecutive hours, the incumbent must agree to continue with the agency for a period of time equal to three times the period of training. If the incumbent separates before fulfilling this requirement, the incumbent must reimburse the agency for its expenses incurred during the educational leave.

An agency could not, within the intent of SPB rule 13.6, grant educational leave to imminent retirees. To the extent that paid educational leave is granted for the purposes stated in SPB rule 13.6 and the member satisfies that rule's service requirement, the member lawfully may receive payment during the leave period as remuneration for personal services rendered. See Op. Att'y Gen. No. 72-67 (1972). PERA and this Office should scrutinize cases involving paid educational leave, which, presumably, are few in number.

We respond next to question 1(g). Availability of the exception to the three-year service requirement depends on coverage under plans 1 and 2 obtained with the "same affiliated public employer." In the circumstances described in question 1(a), those members experiencing such breaks in service will not qualify for the exception, whether they returned to employment with their previous state-agency employers or with different state-agency employers. Provided a member's service with the state is continuous for three years before coverage plan 2 becomes applicable to the member, that the member may have transferred from one state-agency employer to another state-agency employer during this three-year period of time will not affect the member's service credit under state general member coverage plan 1, nor the member's ability to qualify for the exception to the three-year service requirement.

The term "affiliated public employer" means "the state and any public employer affiliated with the association." Section 10-11-2(B) NMSA 1978. "Public employer" means "the state, any municipality, city, county... including the boards, departments, bureaus and agencies of a public employer." Section 10-11-2(L) NMSA 1978. While each state agency is regarded as a distinct public employer for remittance purposes, Section 10-11-124(A) NMSA 1978, the object to the phrase "same affiliated public employer" in Section 10-11-8(F) NMSA 1978 is to prevent "job jumping" from a public employer covered under a lower benefit formula to a public employer covered under a higher benefit formula to retire at the higher formula from the second entity after working, if at all, for a brief period of time. In the context of state agency transfers, not affecting a member's continuous service, where the transferring member remains covered under the same benefit plan, specifically, state general member coverage plan 1, the abuse that the phrase remedies is not evident.

We respond next to questions 2 and 3. We advise that our answers to question 1(a) through 1(g) would be the same if the dates "April 9, 1987," and "July 1, 1987," were substituted for "first session of the 1987 Legislature."

We respond next to question 4. Sick and annual leave, if properly granted and taken within the limitations of the State Personnel Board Rules, will not affect a member's



eligibility to retire under the 2 1/2% formula. Such leave, if proper, may also extend beyond October 16, 1987. Paid administrative or educational leave given for no purpose other than to extend employment and thereby to obtain the 2 1/2% benefit is not leave given for a purpose that the personnel rules recognize and will not accord a member eligibility to retire under the 2 1/2% formula using the exception to the three-year service requirement. We must examine these cases individually.

We respond next to question 5. A vested former member's "[e]ligibility for normal retirement, amount of normal retirement pension... shall be determined according to the provisions of the Public Employees' Retirement Act at time of termination of membership." Section 10-11-9(B) NMSA 1978. A vested former member in the circumstances of the question was covered under coverage plan 1 when the member terminated employment. The vested former member has at least five years of PERA service credit. Section 10-11-9(A) NMSA 1978.

Section 10-13-4 NMSA 1978 of the Retirement Reciprocity Act, Sections 10-13-1 to 10-13-5 NMSA 1978, provides:

In the event a member leaves a position covered by the retirement association [PERA] and becomes employed in a position covered by the educational retirement system, the following provision shall apply, together with the other provisions of the Retirement Reciprocity Act....

A. A member shall have at least one year of credited service in force under the state system from which he transfers his employment, and he shall have at least one year of credited service in force for service credited immediately prior to his retirement under a state system, except that the requirement of one year of service immediately prior to retirement shall not apply to those members who have at least five years of contributory service in the system under which they retire.

As reflected in subsection A of Section 10-13-4 NMSA 1978, a vested former member having at least five years of service is excepted from the requirement of service for at least one year immediately before retirement under PERA. If also accorded the exception to the three-year service credit requirement in 10-11-8(F) NMSA 1978 to obtain the 2 1/2% benefit, that vested former member could resume brief employment in a position covered under PERA and obtain a proportional PERA benefit calculated at 2 1/2%. The exception contained in Section 11-11-8(F) NMSA 1978 was not intended to encompass employees who "job jump," and the language, "applied to the same affiliated public employer" was intended to prohibit an advantage to employees who change employment to secure the immediate benefit of the 2 1/2% formula. Therefore, vested former members returning to PERA employment in the circumstances of the question are not entitled to the exception to the three-year service requirement contained in Section 10-11-8(F) NMSA 1978.

We respond next to question 6. Section 10-13-9 of the Judicial Retirement Act, Sections 10-13-6 to 10-13-9 NMSA 1978, provides:

In the event... a member leaves a position covered by the judicial retirement system and becomes employed in a position covered by the retirement association, the following provisions apply, together with the other provisions of the Judicial Retirement Reciprocity Act...:

A. a member shall have at least five full years of credited service in force under the retirement association [PERA] and at least five full years of credited service in force under the judicial retirement system;

The same reasoning stated in response to the previous question applies to this question. Such a vested former member resuming employment in a position covered by PERA is not entitled to the exception contained in Section 10-11-8(F) NMSA 1978.

We respond next to question 7. The issue is whether the vested former member who resumes employment in a position covered by PERA may avail himself of the exception to the three-year service credit requirement for retirement under the 2 1/2% formula. The answer is that such member may not do so. It is immaterial whether the member works fifteen days, six months, or one year under coverage plan two. Section 10-11-8(F) NMSA 1978 requires service under state general member coverage plan 2 for three years to obtain that plan's benefits.

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