

Opinion No. 87-79

December 23, 1987

OPINION OF: HAL STRATTON, Attorney General

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TO: Mr. Dan Gutierrez, Chairman, Public Employees' Retirement Board, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

QUESTIONS

May a person retired under the provisions of the Public Employees' Retirement Act resume employment, without suspension of retirement benefits, with a governmental employer whose employees are, for retirement purposes, covered exclusively under the provisions of the Educational Retirement Act?

CONCLUSIONS

No.

ANALYSIS

In 1947, the legislature enacted a public employees' retirement act for employees of the State and of its political subdivisions. 1947 N.M. Laws, ch. 167. This legislature also enacted a judges' retirement plan. 1947 N.M. Laws, ch. 132. Chapter 167 of 1947 New Mexico Laws defined "public employer" as "the State [and] any municipality, city or county," and defined "public employee" as "any person holding a State, Municipal, City or County office in any capacity..., excepting professors and instructors and employees in the educational institutions within the State, which have an established retirement plan for such employees." 1947 N.M. Laws, ch. 167.¹ Chapter 167 of 1947 New Mexico Laws did not contain a suspension provision. Section 5 of chapter 132, 1947 New Mexico Laws, which pertained to judges, did provide for suspension. That section recited: "The right to receive the retirement pay herein provided for shall be suspended during the period that any such person occupies a public office to which a salary is attached and shall be resumed upon retirement therefrom."

In 1953, the legislature enacted a new public employees' retirement act. 1953 N.M. Laws, ch. 162. This act defined "public employer" as the "State or any municipality [further defined as a city, county or conservancy district]," and defined "employee" as "any person who is in the employ of any public employer.... [except] any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the State of New Mexico or any of its political subdivisions." 1953 N.M. Laws, ch. 162, § 1.² Section 13 of chapter 162 provided: "Any superannuation retirement annuity payable to any retired member shall be suspended for any period of service as an employee of

any public employer and shall be resumed upon termination of such employment. During such suspension of his superannuation retirement annuity he shall not again become a member."

In 1959, the legislature amended section 6 of chapter 162 of the 1953 New Mexico Laws to recite: "In the event a member becomes an annuitant, by reason of his retirement, he shall thereupon cease to be a member for so long as he shall be an annuitant; but if said person is thereafter again employed by a public employer which is or which thereafter becomes an affiliated public employer, said person shall again become a contributing member upon such employment or affiliation, whichever last occurs, for the period of such employment for the limited purpose of acquiring additional service credit and permitting recomputation of his annuity, without change of option or election, upon termination of such employment." This legislature revised the suspension provision of 1953 N.M. Laws, ch. 162, § 13 in an identical manner. 1959 N.M. Laws, ch. 371, § 2 and § 5. The term "affiliated public employer" included all public employers, as defined in 1953 N.M. Laws, ch. 162, § 1, except any municipality that had exempted itself under earlier laws or had not affiliated. 1959 N.M. laws, ch. 371, § 1.

Section 5-5-13 NMSA 1953, the suspension provision, as amended by 1959 N.M. Laws, ch. 371, § 5, has remained substantially the same, insofar as is pertinent here. See Section 10-11-22(D) NMSA 1978 (1986 Cum. Supp.) (repealed by 1987 N.M. Laws, ch. 253, § 140). The Public Employees' Retirement Act ("PERA") enacted by the legislature in 1987 provides, at Section 10-11-8(C) NMSA 1978 (1987 Repl.):

Except as provided in Subsections D and E of this section, payment of a normal retirement pension shall be suspended at the end of the calendar month of the first calendar year in which a retired member, who is reemployed by or serves a term of office with an affiliated public employer, earns one hundred percent or more of the amount which causes a decrease or suspension of an old age benefit under the federal social security program....

Section 10-11-2(B) NMSA 1978 (1987 Repl.) defines "affiliated public employer" as "the state and any public employer affiliated with the association as provided in the Public Employees' Retirement Act." Section 10-11-2 (L) NMSA 1978 (1987 Repl.) defines "public employer" as "the state, any municipality, city, county, metropolitan arroyo flood control authority, economic development district, council of government and conservancy district,...."

These definitions changed existing law but are quite similar to the PERA statutes of 1947 and 1953. Before 1987, "public employer" meant "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.) (repealed by 1987 N.M. Laws, ch. 253 § 140). The phrase excluding entities covered under the Educational Retirement Act ("ERA"), Sections 22-11-1 to 22-11-45 NMSA 1978, was added by 1971 N.M. Laws, ch. 292, § 1. This phrase does not, however, limit the effect of the PERA suspension provision, applicable to a retiree's return to

employment with a "public employer," in cases where ERA coverage is unavailable to a PERA retiree who assumes such ERA covered employment. See Op. Att'y. Gen. 87-37 (pertaining to a PERA retiree's employment with the department of education, an entity whose employees, generally, make elect either PERA or ERA coverage).

As amended by 1987 N.M. Laws, ch. 253, § 2, governmental entities covered by ERA are no longer excluded from the definition of public employer. Adoption of a amendment is evidence of an intention to change the law. See, e.g., *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971). Whether employees of those entities are covered by PERA or by ERA is answered by Section 10-11-3(A) NMSA 1978 (1987 Repl.), which provides: "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 in accordance with Subsection B of this section." Subsection B does not exclude PERA retirees who assume employment with an entity covered under ERA, and, to the extent of any conflict between Section 10-11-3 NMSA 1978 (1987 Repl.) and the ERA statutes, Section 10-11-3 NMSA 1978 (1987 Repl.) would control, being a later enacted statute. See, e.g., *Abbott v. Armijo*, 100 N.M. 190, 191, 668 P.2d 306, 307 (1983); *City of Alamogordo v. Walker Motor Co., Inc.*, 94 N.M. 690, 692, 616 P.2d 403, 405 (1980). We must, however, reconcile statutes, if possible, so that they do not conflict. See *State ex rel. Clinton Realty Co. v. Scarborough*, 78 N.M. 132, 135, 429 P.2d 330, 333 (1967). Where two statutes can be construed together to preserve the objects to be attained by each, they should be so construed. See *State ex rel. State Park and Recreation Commission v. New Mexico State Authority*, 76 N.M. 1, 29, 411 P.2d 984, 1004 (1965).

The object of the PERA and ERA statutes was to provide retirement benefits for the state's public employees. School districts are instrumentalities of the state, "created to aid in the administration of education." *McWhorter v. Board of Education*, 63 N.M. 421, 424, 320 P.2d 1025, 1027-28 (1958). When, in 1957, the legislature enacted the educational retirement act, repealing earlier teacher retirement statutes, it provided:

Nothing contained in the Educational Retirement Act shall be construed to affect in any manner membership in or coverage under the... program for the retirement of public employees... of persons covered thereunder who are in positions of employment on the effective date of the Educational Retirement Act [who] elect to exempt themselves from membership under the Educational Retirement Act....

In the event election of exemption is not filed as herein provided, all such persons shall continue to be members under the Educational Retirement Act and the state of New Mexico shall no longer be responsible directly or indirectly for the payment of contributions or other payment on behalf [of], or benefits to such persons, except as provided in the Educational Retirement Act.

1957 N.M. Laws, ch. 197, § 20. Chapter 197 described employers, whose employees might qualify for membership, as "local administrative units," and those units included state educational institutions enumerated in article XII, section 11 of the state

constitution, eastern New Mexico normal, and "the state or public school districts or boards of education." 1957 N.M. Laws, ch. 197, § 1. Present law, Section 22-11-2 NMSA 1978, includes, as local administrative units, state educational institutions named in article XII, section 11 of the state constitution, junior colleges, technical and vocational institutes, New Mexico boys' school, girls' welfare home, Los Lunas mental hospital, school districts, state institutions or agencies providing an instructional program, department of education, educational retirement board, and public school finance division.

"Regular members" of ERA are those employed as teachers, nurses, or administrators, and "provisional members" are employees not eligible to be regular members. Section 22-11-2(B) and (C) NMSA 1978. ERA members are entitled to disability and retirement benefits when they satisfy certain statutory requirements. Sections 22-11-23, 22-11-24, 22-11-27, 22-11-30, and 22-11-35 NMSA 1978 (1987 Supp.). "Except as otherwise provided in the Educational Retirement Act, being a regular member shall be a condition of employment and shall exclude membership and participation in any other state retirement program." Section 22-11-16 NMSA 1978. Except for provisional members employed by the local administrative units specified in Section 22-1-17(D) NMSA 1978 (1987 Supp.), such members employed after July 1, 1971, do not have an option to exempt themselves from ERA coverage and they must be so covered. Section 22-11-18 NMSA 1978.

ERA statutes requiring "membership" evidence the legislature's intent that such members, upon meeting ERA's statutory requirements, will be entitled to ERA retirement benefits. Otherwise, the legislature would not have precluded such member-public employees "from participation in any other retirement system." In other words, ERA members, to receive public retirement benefits, must look solely to ERA statutes for such benefits. A person may not draw retirement benefits from both PERA and ERA. Op. Att'y. Gen. 60-164 and 87-37. PERA annuitants that local administrative units employ do not qualify for retirement coverage. See Op. Att'y. Gen. 87-37. Accordingly, their ERA membership is useless. Statutes will not be construed in a manner leading to absurd, inequitable, or unreasonable results. See State ex. rel. Board of County Commissioners of Bernalillo County v. Jones, 101 N.M. 660, 661, 687 P.2d 95, 96 (1984); Op. Att'y. Gen. 87-37 and 87-38.

PERA statutes do not exempt from the suspension provision PERA retirees that ERA local administrative units employ. When the legislature has exempted PERA retirees from the suspension statute, it has done so explicitly. See Section 10-11-8(D) and (E) NMSA 1978 (1987 Repl.) (pertaining to retirees appointed undersheriff or chief of police and those becoming elected officials); 1967 N.M. Laws, ch. 117, § 1 (repealed by 1973 N.M. Laws, ch. 344, § 1) (permitting retired state policemen to continue to receive annuities while employed with local law enforcement agencies); 1969 N.M. Laws, ch. 233, § 1 (amended by 1973 N.M. Laws, ch. 344, § 2 to provide a cut-off date) (permitting any retiree to continue to receive an annuity while employed by local governments). Moreover, PERA and ERA statutes defining employment, employer, and employees generally do so for the purpose of defining benefit coverage eligibility and

not for the purpose of sanctioning concomitant receipt of public retirement benefits and public salary. To employ these definitions for the latter purpose is not expressly envisioned by the legislature. See *State v. Foraker*, 64 N.M. 71, 72, 323 P.2d 1107, 1108 (1958) (in the absence of a statutory suspension statute, court refused to permit continuation of retirement benefits to retired teachers who resumed employment with the public schools, characterizing their desired continuation of benefits as "a pyramiding of income, something which the teaching profession would not approve, and something not contemplated by the legislature").

Accordingly, we conclude that a PERA retiree who returns to employment with a governmental entity whose employees are covered exclusively under the provisions of ERA for retirement purposes may not continue to receive PERA benefits. Such retiree's benefits must be suspended. That retiree is employed by an affiliated public employer and his "membership," within the meaning of that term, is not provided for in ERA.

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GENERAL FOOTNOTES

[n1](#) The teachers' retirement act originally was enacted as 1937 N.M. Laws, ch. 112 and provided retirement benefits to any teacher, supervisor, custodian, nurse, principal, superintendent, or other professional employee. In 1947, this act provided benefits to not only these employees but other "regular full-time employee[s] of the public schools or any regular full-time employee of the aforesaid state institutions." These state institutions included the state retirement board, state board of vocational education, state education institutions mentioned in article XII, section 11 of the state constitution, Eastern New Mexico Normal, the state museum, girl's welfare home, state's industrial school, and state department of education. 1947 N.M. Laws, ch. 74, § 1.

[n2](#) Section 1 of chapter 57 of the 1953 New Mexico Laws amended the teachers' retirement act to provide: "Employees covered by this act are hereby exempted from the provisions of all other State Retirement Acts." In *State ex rel. Public Employees' Retirement Board v. Mechem*, 58 N.M. 495, 500-503, 273 P.2d 361, 364-366 (1954), the Supreme Court of New Mexico held that this exemption gave the covered employees the right to elect coverage under the public employees' retirement act, stating that the legislature "has exempted a special class of public employees, those covered by the Teachers' Retirement Act from such general [membership] provision [of the public employees' retirement act]."