

Opinion No. 87-75

December 7, 1987

OPINION OF: HAL STRATTON, Attorney General

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TO: Felix T. Muniz, Fire Chief, Fire Department, Fort Bayard Medical Center, P.O. Box 219, Fort Bayard, New Mexico 88036

QUESTIONS

Does the Volunteer Firefighters Act, 1983 N.M. Laws, ch. 263, §§ 1 through 7, exclude state employees covered under the Public Employees' Retirement Act from the benefits provided by the Volunteer Firefighters Act?

CONCLUSIONS

Yes.

ANALYSIS

The Volunteer Firefighters Act, 1983 N.M. Laws, ch. 263, codified as Sections 10-11A-1 to 10-11A-7 NMSA 1978 (1987 Repl.), permits a volunteer non-salaried firefighter of a volunteer fire department to receive a retirement annuity of \$200 per month upon retirement at the age of 55 with 25 or more years of service credit. Smaller annuities are payable with 10 years of service credit. Section 10-11A-5 NMSA 1978 (1987 Repl.). The Volunteer Firefighters Retirement Act is not a contributory retirement plan, meaning that volunteer firefighters do not pay contributions to fund the retirement benefits provided under this act. Such annuities are payable from a "volunteer firefighters retirement fund," to which the state treasurer transfers annually \$500,000 from the fire protection fund. Section 10-11A-3 NMSA 1978 (1987 Repl.).

Section 10-11A-2 NMSA 1978 (1987 Repl.) provides: "Excluded from membership is any volunteer non-salaried firefighter 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 29-1-1 through 29-4-11 NMSA 1978." The purpose of this section is to prevent a state employee from drawing retirement benefits from two or more state retirement systems. Both the Public Employees' Retirement Act ("PERA"), Sections 10-11-1 to 10-11-139 NMSA 1978 (1987 Repl.), and the Educational Retirement Act ("ERA"), Sections 22-11-1 to 22-11-45 NMSA 1978, contain similar exclusions from membership and participation in other state retirement programs. See Section 10-11-3(A) ("Except as may be provided for in the Volunteer Firefighters Retirement Act ... the Educational Retirement Act ... each employee and elected official

of an affiliated public employer shall be a member of the association."); Section 22-11-16 NMSA 1978 ("Being a regular member shall be condition of employment and shall exclude membership and participation in any other state retirement program."). 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 Op. Att'y. Gen. 60-164 (discussed in Op. Att'y. Gen. 65-13). This Office reaffirmed this prohibition in Op. Att'y. Gen. 87-37. Accordingly, we conclude that a PERA member, having entitlement to PERA retirement benefits upon meeting the necessary age and service requirements, may not also participate in and receive benefits under the Volunteer Firefighters Act.

ATTORNEY GENERAL

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