

**Opinion No. 88-44**

July 18, 1988

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

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

**TO:** Carlos A. Gallegos, Executive Secretary, PERA, P.O. Box 2123, Santa Fe, NM 87504-2123

**QUESTIONS**

May a disability annuitant who retired before July 1, 1987, utilize the new "trial period" provisions of the Public Employees Retirement Act effective July 1, 1987?

**CONCLUSIONS**

Yes.

**ANALYSIS**

The recodification of the Public Employees Retirement Act ("PERA") by 1987 N.M. Laws, ch. 253, effective July 1, 1987, changed the disability benefit suspension provisions. Section 10-11-10E NMSA 1978 (Repl. 1987) provides:

Each disability retired member shall annually submit to the association, prior to July 1, a statement of earnings from gainful employment during the preceding calendar year. The statement of earnings shall be in the form requested by the association. Payment of the disability retirement pension shall be suspended for the months of July through December if the amount of earnings from gainful employment is 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. Payment of the disability retirement pension shall be suspended starting with the month of July if the statement of earnings is not received by the association prior to July 1.

Section 10-11-11D NMSA 1978 (Repl. 1987) provides:

A disability retired member may return to employment with an affiliated public employer or other employer for a trial period not to exceed one hundred twenty calendar days without becoming a member or affecting the disability retired member's status upon prior approval by the association. Trial periods of employment shall be limited to two in any five-year period following disability retirement.

Former law that provided for suspension of a disability retiree's benefits, Section 10-11-33 NMSA 1978 (Repl. 1983) (repealed by 1987 N.M. Laws, ch. 253, § 140), provided:

A. At least once each year during the first five years following the retirement of a member or an inactive vested member with a disability annuity, and at least once in each three year period thereafter, the retirement board may ... require any disability annuitant ... to undergo a medical examination to be made by or under the direction of a medical committee....Should any such disability annuitant refuse to submit to such medical examination in any such period, his disability annuity may be discontinued....If upon such medical examination of a disability annuitant the medical committee reports to the retirement board by majority opinion in writing that the annuitant is physically able and capable of resuming gainful employment, his disability annuity shall be suspended to his voluntary retirement date or his attainment of age sixty-five years, whichever occurs first, and shall be resumed at the time and paid as a superannuation retirement annuity, provided he is not in the employ of any public employer.<sup>1</sup>

B. A disability annuitant who returns to service with any public employer shall not receive disability benefits from the date of his return. If the public employer to which he returns is an affiliated public employer, he shall again become a contributing member of the association.

Initially, we believe that the Legislature intended the "trial period" provision of Section 10-11-11D to apply to persons who took disability before July 1, 1987. The legislature distinguishes between persons who will retire in the future and persons who already have retired by using the terms "member" and "retired member," respectively. See Sections 10-11-4G ("A member may reinstate forfeited credited service by paying...."; 10-11-7A ("A member...may purchase credited service..."); 10-11-8A ("A member...may retire...."); 10-11-8C (pension suspended when a retired member who is reemployed by an affiliated public employer earns 100% or more of the amount social security allows); 10-11-8D and E (suspension provision does not apply to a retired member who resumes certain types of employment); 10-11-10A ("The retirement board may retire a member...on account of disability...."); 10-11-10E ("Each disability retired member shall annually submit [earnings statement]...."); 10-11-11A ("The association may require a disability retired member to undergo periodic medical or other re-evaluations...."); 10-11-21 ("State general member coverage plan 2 is applicable to state general members after September 30, 1987."); 10-11-117E ("A retired member who elected form of payment B or C prior to July 1, 1987...may elect to have amount of pension changed...."); 10-11-118B ("The amount of pension payable to a qualified pension recipient shall be adjusted each July 1"); 10-11-118C defines a "qualified pension recipient" as "a normal retired member" and a "a survivor pension beneficiary."; 10-11-121 ("Any member...may continue to be insured...if the retired member...pays the periodic premium charges...." See also 1987 N.M. Laws, ch. 253, § 139 ("A member may purchase not more than five years of credited service...." Because Section 10-11-11D, which was effective July 1, 1987, uses the term "retired member," we infer an intent that it apply to persons who took disability retirement before the effective date.

Article IV, Section 27 of the New Mexico Constitution prohibits the State from paying employees extra compensation for services previously rendered: "No law shall be enacted giving any extra compensation to any public officer....after services are

rendered..." In **State ex rel. Sena v. Trujillo**, 46 N.M. 361, 129 P.2d 329 (1942), the New Mexico Supreme Court held that Article IV, Section 27 prohibited the State from granting a pension to a former state employee, because the legislature enacted the pension statutes after he retired. The former employee did not render services to the State under any contract of employment that provided a pension as part of the contemplated compensation for services; nor did he enter the State's service, remain therein and leave, because of the later pension act. The court relied on **Porter v. Loehr**, 332 Ill. 353, 361, 163 N.E. 689, 691-92 (1928), which applied a similar constitutional provision to a statutory amendment that increased pension benefits.

We are aware of no cases that apply Article IV, Section 27 or a similar provision to an amendment that gives disability retirees a right to return to work for a trial period and retain their pension. We conclude, however that Section 10-11-11D, does not violate Article IV, Section 27. In contrast to the fact situation in **State ex. rel. Sena v. Trujillo**, Section 10-11-11D does not grant a retiree extra compensation for past services. The retiree's pension remains the same, and his new wages, if from public employment, represent a public employer's compensation for performing his new job. We note that under the old law a disability retiree could return to work for a private employer without suffering automatic suspension of his pension, although this return could evidence the ability to be gainfully employed and thus require benefit suspension. The only added benefit in Section 10-11-11D is the fact that the retiree does not lose his pension for 120 days if he returns to work for a public employer. In our opinion this does not amount to "extra compensation" for past services.

We conclude, therefore, that a disability annuitant retired under the provisions of PERA in effect before July 1, 1987, may return to employment for a "trial period" pursuant to Section 10-11-11D.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) Current law also provides for reexaminations of disability annuitants, but does not mandate examinations at specific intervals. Section 10-11-11 provides:

A. The association may require a disability retired member to undergo periodic medical or other reevaluation at the association's expense or submit acceptable evidence of continuation of disability....

B. The retirement board may suspend payment of a disability pension if the disability retired member refuses to submit to reevaluation. If the refusal continues for one year, the retirement board may terminate the disability retirement pension and revoke the disability retired member's right to the disability retirement pension.

C. A disability pension shall be terminated if the medical committee reports to the retirement board that the disability retired member no longer meets the requirements for disability retirement.