Opinion No. 88-19

March 4, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Leonard T. Valdes, Executive Secretary, P.O. Box 2123, Santa Fe, 87504-2123

QUESTIONS

1. May Ms. Olivia V. Bacon retire under state general member coverage plan 2, where she took maternity leave, i.e. leave without pay, from August, 1986, through December, 1986?

2. May Mr. Joe Salazar retire under state general member coverage plan 2, where he took leave without pay from April 1, 1986, through June 7, 1986, to campaign for political office?

3. May Mr. Benito Juarez retire under state general member coverage plan 2, where he took leave without pay from August 20, 1985, through June 30, 1986, to attend a university from which he obtained a masters degree in public administration?

4. May Ms. Virginia Gorman retire under state general member coverage plan 2, where she took leave without pay from July 28, 1986 to August 24, 1986, because she was ill and had exhausted her sick and annual leave?

CONCLUSIONS

1. Yes.

2. Yes.

3. See analysis.

4. Yes.

ANALYSIS

We assume that Ms. Bacon, Mr. Salazar, Mr. Juarez, and Ms. Gorman meet the age and service requirements necessary for normal retirement; that each returned to employment with the employer-state agency that granted the leave without pay; that each has remained employed with that employer after returning to employment; that each has obtained credited service under state general member coverage plan 2; and

that, for each, service credit with the state is continuous for a period of three years before October 1, 1987, but for the months of leave without pay in question here.

Ms. Bacon's employer, the State Highway Department, granted her a four-month period of maternity leave, i.e., leave without pay, in 1986, pursuant to its maternity leave policy. This policy provides: "Maternity leave is a period of approved absence for incapacitation related to pregnancy and confinement. It is chargeable to sick leave, annual leave, leave without pay or any combination thereof." Ms. Bacon states that her leave was medically necessary, and that her doctor requested her to take such leave. Mr. Salazar's employer, the Public Employees' Retirement Association ("Association"), granted his request for two months leave without pay during 1986, to permit him to campaign for political office. During this leave period, Mr. Salazar remained available to assist the Association in its records division's work.

In Mr. Juarez' case, his employer, the Employment Security Division, granted his request for ten months leave without pay during 1985 and 1986 to permit him to attend Harvard University, from which he obtained a master's degree in public administration. This program required one academic year of full-time study in residence at the university, and prohibited degree candidates from continuing their current employment or engaging in any other form of employment during this residency. Ms. Gorman became ill in 1986, and exhausted her sick and annual leave. Upon her doctor's recommendation her employer, the State Corporation Commission, granted her request for one month leave without pay, because of her illness. Ms. Gorman has thirty-six years of service credit under the Public Employees' Retirement Act ("PERA").

None of these facts suggests that the employee secured leave without pay to attempt to qualify for state general member coverage plan 2; or that the employee manipulated otherwise his employment relationship, and thus PERA, to obtain this plan's better benefits.[1] The legislature, by 1987 N.M. Laws, ch. 253, effective July 1, 1987, enacted this plan; state general member coverage plan 2 commenced after September 30, 1987.

Section 10-11-8(F) NMSA 1978 provides an exception to the three-year credited service requirement to retire under state general member coverage plan 2:

The pension of a member who has three or more years of credited service under each of two of 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.

(Emphasis added). In Att'y Gen. Op. 87-66, we advised that the exception must be construed strictly, because it financially affects the Association and is subject to potential manipulation and abuse, as the Association experienced previously with formula AA. In response to the Association's questions about "break in service," meaning a termination followed by a rehire, we advised that state members seeking to retire immediately under state general member coverage plan 2 ("plan 2") must have at least three years continuous employment before October 1, 1987, when plan 2 became available, to qualify for Section 10-11-8(F)'s exception. The Association now requests our advice about those cases where the member, who seeks to use the exception, obtained leave without pay during this three-year period before October 1, 1987.

In construing public pension acts, "a strained and unreasonable construction should not be adopted, and ... the construction should protect both the municipality and the employee.... Pension acts should be so construed as to avoid a result which is inequitable or favors one member over another." 2 McQuillyan, Municipal Corporations § 12.143 (3d ed. 1982). See City of Miami Beach v. Cleary, 75 So. 2d 792, 795 (Fla. 1954). Requiring continuous employment for three years before October 1, 1987, protects the Association from manipulative employments; prevents an employer from engaging in favored hiring of a few for retirement purposes, to the detriment of the Association's membership as a whole; and accords with the legislature's purpose in enacting Section 10-11-8(F)'s exception, which is to benefit long-term, continuously employed state employees. The question is whether the leaves of absence that Ms. Bacon, Mr. Salazar, Mr. Juarez and Ms. Gorman took effected a break in "continuous employment," so as to disqualify them from qualifying for Section 10-11-8(F)'s exception.

Two elements of a leave of absence distinguish it from a termination of employment: permission to leave work and an intent to return to work. Regan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 778 (Utah 1984). "[A] 'leave of absence' is not a complete separation from employment.... It denotes a continuity of the employment status ---- a temporary absence from duty, with intention to return ---- during which time performance of the duties of his work by the employee and remuneration by the employer are suspended." Goodyear Tire & Rubber Co. v. Employment Security Bd., 205 Kan. 279, 285, 469 P.2d 263, 268 (1970).[2] In Goodyear Tire & Rubber Co., the court held that employees who had postponed their vacations were not entitled to unemployment compensation benefits during a vacation shut-down that created a leave without pay status for those employees. In Mattey v. Unemployment Compensation Bd. of Review, 164 Pa. Super. 36, 63 A.2d 429 (1949), the court held that a workman, who was on "vacation without pay," was not "unemployed" for purposes of unemployment compensation laws, because a vacation implies continued service. The employer-

employee relationship was not terminated. Rather, this vacation was a period of freedom from duty, but not the end of employment.

In Boston Retirement Bd. v. McCormick, 345 Mass. 692, 695 189 N.E.2d 204, 206 (1963), the court held that the plaintiff continued to be a "member in service" during her leaves of absence. In Bryan v. Bd. of Trustees of Houston Firemen's Relief and Retirement Fund, 497 S.W.2d 367, 370-71 (Tex. Civ. App. 1973), the court held that a disabled fireman was in "active status," for purposes of applying for retirement benefits, until his period of leave without pay ended. In State ex. rel. Mulrine v. Dorsey, 272 A.2d 709 (Del. 1970), the court defined the phrase "continuous service," used in a public retirement statute, to permit a reasonable and excusable interruption of service. In that case, the court held that a policeman did not lose his pension rights as the result of an excused interruption in service of less than one year. In Blinn v. Board of Trustees, supra, the court held that the grant of a leave of absence to a state employee did not terminate the employment relationship between the state and the employee, and that the employee retained membership in the pension system during the leave of absence. Cf. Cole v. Rawlings Ice Co., 139 Neb. 439, 444, 297 N.W. 652, 655 (1941) (a worker's employment was not "continuous," within the meaning of a workmen's compensation statute, where the workman severed his employment relationship on December 10, and he and his employer created a new employment relationship on December 28).

As this authority reflects, "the phrase 'continuous service' would embrace the idea of continuous employment because without employment there could be no service, but that continuous employment does not necessarily embrace the idea of continuous service...." Kennedy v. Westinghouse Elec. Corp., 29 N.J. Super. 68, 77, 101 A.2d 592, 597, aff'd 16 N.J. 280, 108 A.2d 409 (1954) (noting strike periods, during which striking employees retain their status as employees, even though they render no service) . But in the context of leave without pay, "[a] bona fide leave of absence must contain an assurance by the employer that upon termination of the period of absence the employee will be returned to the same or like work." Lewis v. Calif. Unemployment Ins. Appeals Bd., 56 Cal. App. 3d 729, 736, 128 Cal. Rptr. 795, 800 (1976).

State Personnel Board ("SPB") Rule 13.3(B) provides: Leave without pay, when requested, may be granted only when the agency can assure a position of like status and pay, at the same geographic location, upon the return of the person from leave without pay." Rule 13.3(C), however, permits the employee to waive the requirement that the employer return him to "the same geographic location." An agency may not grant a permanent employee leave without pay to extend beyond twelve consecutive months. Rule 13.3(D). "Incumbents" [persons holding classified positions] do not accrue sick or annual leave while on leave without pay. Rule 13.3(F). An incumbent's failure to report to work after expiration of an approved period of leave without pay is grounds for disciplinary action, such as dismissal. Rule 13.3(H); SPB Rule 14. SPB Rule 13.3 thus comports with a "bona fide" leave of absence without pay, because the agency employer, when it grants such leave, must guarantee to return the employee to his former or like position in the agency.

SPB Rule 13.2(G) addresses maternity leave:

Persons affected by pregnancy, childbirth and related medical conditions must be treated the same as persons affected by other medical conditions. To the extent that pregnancy-related conditions cause long term or permanent disabilities, incumbents affected by such disabilities must be accorded the same rights and benefits accorded to other incumbents with long term or permanent disabilities.

The State Highway Department grants leave without pay to its disabled employees. The department's policy no. 79-84 recites: "[E]xamples of requests [for leave without pay] that may be approved are:... 2. for long-term illness or disability of the employee...." This policy provides that, unless extended, leave without pay shall not exceed a six-month period. The department's maternity leave policy, therefore, is harmonious with and is contemplated by SPB Rules 13.2 and 13.3. Under these rules, Ms. Bacon was continuously employed by the State Highway Department for three years before October 1, 1987, despite her four-month maternity leave, and she may retire under state general member coverage plan 2.

Some state employees may obtain leave without pay to run for political office. SPB Rule 18.3(C) permits "[i]ncumbents not covered by the provisions of the Hatch Act [to] be candidates for any public office if, upon filing or accepting the nomination and during the entire campaign, the incumbent is authorized leave without pay." SPB Rule 18.3(B), however, prohibits incumbents covered by the Hatch Act from being candidates in a partisan election; SPB Rule 18.3(D) provides that incumbents may not hold political office during employment in the service, meaning state personnel service created by the Personnel Act, including positions covered by the Personnel Act, Sections 10-9-1 to 10-9-25 NMSA 1978 (1987 Repl.). The Hatch Act, 5 U.S.C. §§ 1501 to 1508, defines, with some exceptions, "state employee" as "an individual employed by a State ... agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency." Id. § 1501(4). Mr. Salazar's employer, the Association, receives no federal funds to finance its operations. See 1986 N.M. Laws, ch. 2, pgs. 58-59; 1987 N.M. Laws, ch. 355, pgs. 2679-80. The Association's employees, therefore, are not covered by the Hatch Act. The leave the Association granted to Mr. Salazar therefore conforms to SPB rule 18.3(C). He was continuously employed by the Association for three years before October 1, 1987 and may retire under state general member coverage plan 2.

SPB Rule 13.6 permits an agency to grant educational leave to an incumbent. This leave may be with or without pay. Rule 13.6(B). If he is granted leave with pay, the incumbent must agree to work for his agency for a period of three times the leave period. Rule 13.6(C). Mr. Juarez' agency-employer, the Employment Security Division, granted him leave without pay. Whether this leave conforms to Rule 13.6 depends on the agency-employer's purpose in granting the leave. Rule 13.6(A) provides that educational leave's purpose 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. Such training must be of direct value to the state...." The

Association should verify with the Employment Security Division that Mr. Juarez' leave met the requirements of Rule 13.6(A). If it did, then he was continuously employed by the Employment Security Department for three years before October 1, 1987 and may retire under state general member coverage plan 2.

Ms. Gorman's leave without pay for medical reasons was for less than thirty days. SPB rules do not require the agency to report such leave on a personnel action request. Rule 13.3(G). Ms. Gorman did not suffer days lost toward eligibility for a merit increase. Rule 13.3(E). The leave was for a purpose that state agencies recognize commonly. Therefore, Ms. Gorman remained continuously employed by the State Corporation Commission for three years before October 1, 1987 and may retire under state general member coverage plan 2.

Because a leave of absence without pay can be distinguished from a termination of employment; is not a complete separation of employment; and denotes continuity of employment status, we conclude that members who take a bona fide leave of absence without pay are eligible for Section 10-11-8(F)'s exception to the three-year credited service requirement for coverage under state general member coverage plan 2. We emphasize that our conclusion rests upon the absence of any apparent motive or opportunity to use the leave of absence to manipulate PERA coverage.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1 Plan 2 is better than plan 1, because plan 2 provides a 2 1/2% benefit formula (instead of 2%) and permits a maximum annuity of 75% of final average salary (instead of 60%). See Sections 10-11-17 and 10-11-23 NMSA 1978.

n2 Accord, Bowers v. American Bridge Co., 43 N.J. Super. 48, 57, 127 A.2d 580, 585, aff'd, 24 N.J. 390, 132 A.2d 28 (1957) ("leave of absence" connotes continuity of the employment relationship); Roche v. Board of Review, 156 N.J. Super. 63, 65, 383 A.2d 453, 455 (1978) (a "leave of absence" connotes a continuity of the employment status not conditioned upon such things as contingent availability of employment or change of heart); Chenault v. Otis Engineering Corp., 423 S.W.2d 377, 383 (Tex. Civ. App. 1968) (a "leave of absence" is not a complete separation from employment; it connotes a continuity of the employment status, during which time performance of duties by the employee and remuneration by the employer and other fringe benefits may be suspended). See also Gibbons v. Sioux City, 242 Iowa 160, 165, 45 N.W.2d 842, 844 (1951) ("leave of absence connotes a permission to be away from a certain place for a stated time with the supposition of returning thereto"); Blinn v. Board of Trustees, 173 N.J. Super. 277, 278-79, 414 A.2d 263, 264 (1980) (leave of absence is "simply an authorized temporary absence from active service which ... implies the right of the employee to return to active employment in the employer's service at the conclusion of

such leave of absence"); State ex rel. McGaughey v. Grayston, 349 Mo. 700, 710, 163 S.W.2d 335, 341 (1942) ("[t]he common meaning of the term [leave of absence] signifies temporary absence from duty with an intention to return"); Lauderdale v. Division of Employment Security, 605 S.W.2d 174, 177 (Mo. App. 1980) (leave of absence is "temporary absence from duty with intention to return"); Employment Security Comm'n v. Vulcan Forging Co., 375 Mich. 374, 379, 134 N.W.2d 749, 752 (1965) (leave of absence "signifies an authorized temporary absence from work for other than vacation purposes").