

## **Opinion No. 88-70**

November 9, 1988

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

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

**TO:** Carlos A. Gallegos, Executive Secretary, Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

### **QUESTIONS**

Must Mr. Valentine Vega be a member of the Public Employees Retirement Association, because the City of Deming employs him part-time, when Deming's public school system simultaneously employs him as a full-time teacher?

### **CONCLUSIONS**

No.

### **ANALYSIS**

Mr. Valentine Vega is a teacher employed by the Deming Public Schools. The City of Deming also employs Mr. Vega on a part-time basis, although he typically works forty hours per week for the City during the summer months. Paragraph 22-11-2(B)(2) of the Educational Retirement Act ("ERA"), Sections 22-11-1 to 22-11-45 NMSA 1978 (Repl. 1986), provides that "[a] person regularly employed as a teaching ... employee of ... a school district" is a "regular member" of the educational retirement system. ERB Rule II (B)(2) ("In the public school districts... 'regular members' shall be all regularly employed teachers... who are holders of appropriate certificates....") We also understand that Mr. Vega has not retired previously under the Public Employees Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987). Therefore, his membership in the educational retirement system and ERA service credit attributable to his Deming school employment would entitle him to ERA benefits upon acquiring the necessary age and service credit. Cf. Att'y Gen. Ops. 87-37 (1987), 87-79 (1987) (PERA annuitants employed by ERA employers do not qualify for ERA benefits; therefore, such annuitants may not be ERA "members" to avoid PERA benefit suspension).

Section 22-11-16 of the ERA provides: "Except as otherwise provided in the [ERA], being a regular member shall be a condition of employment and shall exclude membership and participation in any other state retirement program." Because Mr. Vega works part-time for the City of Deming ("Deming"), the question is whether Section 22-11-16 conflicts with PERA's membership provisions and, if so, which act controls.

We find no conflict. Subsection 10-11-3(A) of the PERA provides: "Except as may be provided for in... the Educational Retirement Act... each employee... of an affiliated public employer shall be a member of the association unless excluded from membership in accordance with Subsection B of this section.<sup>1</sup> Thus, the PERA does not require membership in the public employees retirement association ("association") where the ERA requires membership in the educational retirement system. Sections 10-11-3 and 22-11-16 are consistent. While Mr. Vega is a "regular member" of the educational retirement system, he may not also be an association member.<sup>2</sup>

Accordingly, we conclude that PERA does not require that Mr. Vega become or remain a member of the association while Mr. Vega is a regular member of the educational retirement system, and that he may not be an association member while he is a regular member of the educational retirement system.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) Paragraph 10-11-3(B)(5) excludes: "[E]mployees on June 30, 1987, who have been excluded from membership as a consequence of being in a part-time ... occupational classification." We do not address whether Mr. Vega's Deming employment qualified for this exclusion, because Deming did not exclude him from PERA membership on June 30, 1987 as a consequence of his part-time classification.

[n2](#) We note that the Retirement Reciprocity Act ("Reciprocity Act"), Sections 10-13-1 to 10-13-5 NMSA 1978 (Repl. 1987), does not apply to a person who is employed simultaneously in a position covered by PERA and another covered by ERA. See Section 10-13-4 ("In the event a member leaves a position covered by [PERA] and becomes employed in a position covered by [ERA], or [vice-versa], the following provision shall apply....") (Emphasis added.) The Reciprocity Act rules, which both retirement systems have adopted, address overlapping service, but not employment: "Overlapping service shall be granted [absorbed] by the system from which the member retires...." PERA Rule 1400.30(e); ERB Rule X(c)(3)(a). Overlapping service can occur where a person leaves a position covered under ERA and immediately assumes a position covered under PERA. Service credit under both systems for a few of the same months can result, because ERA service is granted for quarters, not months. See ERB Rule IV (A)(2): "Earned service credit shall be granted for employment after July 1, 1957 on a quarterly basis and a member shall receive one quarter of credit for each calendar quarter in which he has earnings from regular employment." PERA service is credited in months and years. See Section 10-11-4. Thus, if a person terminated employment under ERA as of January 31, 1988 and assumed employment under PERA the next day, he would receive service credit under ERA for the first quarter of 1988 and also service credit under PERA for the months of February and March, 1988.