

Opinion No. 89-25

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OPINION OF: HAL STRATTON, Attorney General

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

QUESTIONS

1. May a person appointed to fill an unexpired term of an elected official exempt himself from membership in the Public Employees Retirement Association ("Association") for the remainder of that term?
2. May an elected official who has been a member of the Association for one elected term of office choose to exempt himself from membership when he commences serving a successive term of that elective office?
3. Does the answer to the second question differ if the elected official retires or incurs a break in employment between the two terms?
4. Must an elected official who is exempt from membership on June 30, 1987 file an exemption from membership with respect to that official's successive term of office to remain exempt from membership?

CONCLUSIONS

1. Yes, because the "elected official" exemption applies to persons holding an "elective office."
2. Yes, because the official's membership choice applies to terms.
3. Yes, because the official may not "retire," resume office under a successive term to which he has been re-elected, and attempt to invoke the "elected official" exception to membership and benefit suspension.
4. Yes, because the exemption is restricted to terms of office.

ANALYSIS

The recodification of the Public Employees Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987), revised PERA's membership exemption statutes that pertain to elected officials. Former law automatically accorded exempt

status to non-member elected officials and required that they file a membership application to become Association members. Current law is the reverse: all elected officials, with one obsolete exception, must become members unless they exempt themselves in the manner PERA provides. Former law specifically withdrew the exemption from member elected officials. Current law is silent in regard to the ability of elected officials, who are members, to exempt themselves. Compare Section 10-11-9 NMSA 1978 (1983 Repl.)¹ (repealed by 1987 N.M. Laws, ch. 253, § 140) with Section 10-11-3.

The elected-official exemption under current law provides:

A. [E]ach employee and elected official of an affiliated public employer shall be a member of the association unless excluded from membership in accordance with Subsection B of this section.

B. The following employees and elected officials are excluded from membership in the association:

(1) elected officials who are not members on June 30, 1987;

(2) elected officials who file with the association a written application for exemption from membership within ninety days of taking office;

(3) elected officials who file with the association a written application for exemption within ninety days of the date the elected official's public employer becomes an affiliated public employer;

...

D. An exemption from membership by an elected official shall expire at the end of the term of the office for which filed.

E. [E]lected officials who have exempted themselves from membership may subsequently withdraw the exemption by filing a membership application. Membership shall commence the first day of the first pay period following the date the application is filed.

F. The membership of an ... elected official shall cease upon ... the elected official's relinquishment of office or upon ... the elected official becoming excluded from membership as provided in Subsection B of the section.

Section 10-11-3.

The first question asks whether an "appointee" to an elective office is an "elected official" for purposes of Subsection 10-11-3(B)'s membership exemption option. We

conclude that such appointee is an "elected official" within the meaning of that subsection.

An elected official holds an elective office. An appointee to an elective office similarly holds such office and may exercise and perform the powers and duties belonging to it. See *State ex rel. Rives v. Herring*, 57 N.M. 600, 261 P.2d 442 (1953) (appointee to elective office of county clerk could not be displaced by another appointee to that office; an office is not "vacant" so long as it is supplied in the manner provided by law or the constitution with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it). In *O'Conner v. Bristol County*, 329 Mass. 741, 110 N.E.2d 492 (1953), the court held that an appointee to an elective office was an "elected official" for purposes of a statute that exempted elected officials from a tenure rule that required county employees to terminate employment upon attaining a certain age. The court stated: "[T]he words 'elected official' were intended to distinguish persons holding elective office from other 'employees'...." *Id.* at 747, 110 N.E.2d at 494-495.

Similarly, the words "elected official" as used in Subsection 10-11-3(B) were intended to distinguish persons holding elective office from other employees, whose Association membership is mandatory. In *Cahir v. Reynolds*, 92 R.I. 501, 170 A.2d 612 (1961), the Rhode Island Supreme Court observed:

[E]very state or municipal employee retirement act which we have reviewed provides generally for compulsory membership, except as to employees or officers who are elected or appointed for a fixed term. Such personnel invariably are given the option to become members of the system or not as they may elect. No case has been called to our attention nor have we been able to discover any in which there has been any attempt to explore legislative intent.

Id. at 505, 170 A.2d at 614. New Mexico's legislative intent in granting elected officials the option to exempt themselves from Association membership is not clear. But the option may derive from the fixed nature of the elected officer's term, a characteristic that is inconsistent, in most cases, with the notion of career government employment. An appointee to an elective office that is filled by popular vote is subject to this same limitation as to term. It would not be harmonious with the "elected official" exemption to carve out an exception to Subsection 10-11-3(B) in the case of an appointee to elective office and mandate his Association membership. Therefore, a duly qualified appointee to an elective office may exempt himself from Association membership in accordance with Subsection 10-11-3(B).

The second question asks whether an elected official who is an Association member may exempt himself from Association membership for a successive term of that office. We conclude that he may do so. Subsection 10-11-3(F) states that an elected official's membership ceases when he "becomes excluded" as provided in Subsection B. That subsection allows elected officials to file an exemption within ninety days after "taking office." Subsection D suggests that successive terms may occur by limiting the effect of

an exemption to one term. Otherwise, Subsection D would be unnecessary, because the official's membership necessarily would end when his term expired. Statutes are not construed to render parts surplusage. See, e.g., *Katz v. New Mexico Dept. of Human Servs.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981). The former law's express withdrawal of the exemption from member elected official's is not contained in current law. Therefore, we conclude that an elected official may exempt himself from membership if elected to serve a successive term as provided in Subsection 10-11-3(B)(2).²

The third question assumes that an elected official may retire during his current term, commence receiving retirement benefits, and then assume office under a successive term to which he has been re-elected. The only evident reason for this exercise is to enable the official to invoke the "elected official" exception to membership and benefit suspension in Subsection 10-11-8(E). But we have opined previously that elected officials may not enjoy the benefit of this exception by such maneuver. See Att'y Gen. Op. 87-13 (1987) (elected official may not resign from office, retire therefrom, resume office under a successive term, and then exempt himself from membership and benefit suspension); Att'y Gen. Op. 87-80 (1987) (county treasurer may not retire during a term, resume office under a re-appointment, and exempt himself from membership and benefit suspension); Att'y Gen. Op. 88-26 (1988) (elected official may not purchase early retirement to retire and then serve without pay the remainder of his elective term).

"Retirement" requires a genuine employment termination. See Att'y Gen. Op. 87-14 (1987). In the context of elected officials, a true resignation envisions the appointment of a successor in office. See *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 407, 163 P. 248, 251 (1917) (notwithstanding school board member's resignation by reason of accepting incompatible office, the court was without power under Article XX, Section 2 of the New Mexico Constitution to oust the member in the absence of qualification of a successor in office). Section 10-11-8 does not contemplate or condone brief, interim appointments to public office simply to enable an elected official, who is elected to a successive term, do to that which he would otherwise be unable to do.

The fourth question asks whether an elected official who is exempt on June 30, 1987 must file an exemption with respect to a successive term to retain an exempt status. We conclude that the official must do so, because Subsection 10-11-3(D) limits the effect of an exemption to the term for which filed. Subsection 10-11-3(B)(1) excepted from mandatory membership those elected officials who were exempt on June 30, 1987. This exception avoided surprise and unintended results to those officials who were unfamiliar with the recodified retirement act, which reversed the rules about an elected official's exempt status. But the general rule of membership applies to elected officials who assume office after PERA's July 1, 1987 effective date, and Subsection 10-11-3(B)(2) controls. Accordingly, an elected official who takes office under a successive term must file the exemption from membership in the manner provided by Subsection 10-11-3(B)(2) to retain exempt status.

ATTORNEY GENERAL

GENERAL FOOTNOTES

[n1](#) Subsection 10-11-9(A) provided: "[A]ll employees of an affiliated public employer shall become members of the association as a condition of their employment. Any elected official of an affiliated public employer shall become a member of the association upon his written application filed with the retirement board; any member who becomes an elected official of an affiliated public employer shall continue to be a member."

[n2](#) We do not suggest, however, that an elected official might manipulate his membership status to gain the advantage of an unforeseen benefit change. If an official, having five or more years service, filed an exemption, that official's benefits would be controlled by Section 10-11-9. Thus, his benefits, when he retired, would be based on the law in effect when his membership ceased. If the legislature enacted a better retirement formula during an official's exempted term, that official could not promptly revoke the exemption under Subsection 10-11-3(E) to gain the benefits of that formula.