

## Opinion No. 89-18

June 7, 1989

**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

May the Public Employees Retirement Association award a member disability benefits retroactive to the date the member's name last appeared on the payroll with pay?

### CONCLUSIONS

No, because current law repealed the provisions of former law allowing retroactive disability benefits and requires a member to satisfy the conditions necessary to retire before benefits may commence.

### ANALYSIS

The recodification of the Public Employees Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987), became effective July 1, 1987 and repealed former law that provided for retroactive disability benefits. Under former law, both duty and nonduty disability benefits commenced the date the member's name last appeared on the payroll with pay. Subsection 10-11-31 (C) NMSA 1978 (Repl. 1983) (repealed by 1987 N.M. Laws, ch. 253, § 140) provided:

A member who retires prior to his voluntary retirement date on account of disability ... shall receive a duty disability annuity equal to that which he would normally have received had he continued in employment to his voluntary retirement date

...

**(2) His disability annuity shall begin as of the date his name last appeared on an affiliated public employer's payroll.**

(Emphasis added.) Subsection 10-11-32(C) NMSA 1978 (Repl. 1983) (repealed by 1987 N.M. Laws, ch. 253, § 140) provided: "A member ... who retires prior to his voluntary retirement date on account of disability ... shall receive a nonduty disability annuity ... **His disability annuity shall begin as of the date his name last appeared on active payroll with pay....**" (Emphasis added).<sup>1</sup>

Current law, however, eliminates the retroactive benefit features of former law. In repealing former law's provisions permitting retroactive benefits to the date the member's name last appeared on the payroll with pay, we assume the legislature intended to change the law. See, e.g. *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971) (adoption of an amendment is evidence of intention to change the law).

Current law does not permit retroactive disability benefits. Subsection 10-11-119(A) provides:

A normal or disability pension shall commence the first day of the month following retirement. A preretirement survivor pension shall commence the first day of the month following the date of the death resulting in the pension. A postretirement survivor pension shall commence the first day of the month following the date of the death resulting in the pension.

In Att'y Gen. Op. 88-33 (1988) the Attorney General advised that the Public Employees Retirement Board may not excuse the statutory requirement that a written application for normal retirement benefits be filed before benefits could commence. The Attorney General stated:

[T]o retire, a member must file ... a written application for retirement ... before the desired retirement date. Normal retirement benefits are not retroactive.<sup>2</sup>

In Att'y Gen. Op. 88-15 (1988) the Attorney General advised that a member who terminated employment in March 1987, but who did not apply for normal retirement benefits until December 1987 could not receive retroactive benefits. Rather, his benefits would commence January 1, 1988. The Attorney General stated: "The 1987 recodification of [PERA] does not permit a normal or disability retirement pension to be made retroactive."

To retire under PERA's disability provisions, Subsection 10-11-10(A) provides:

The retirement board may retire a member ... on account of disability if the following requirements are satisfied:

(1) the individual seeking disability retirement was a member ... at the time disability was incurred;

(2) a written application for disability retirement, in the form and containing the information prescribed by the association, has been filed with the association ...

(3) membership is terminated prior to the selected date of disability retirement and:

(a) the member ... has five or more years of credited service; or

(b) the retirement board finds the disability to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer;

(4) the member ... submits to all medical examinations and tests, and furnishes copies of all medical reports ...

(5) the retirement board or the medical committee of the retirement board makes the certification [of disability entitlement] required under Subsection B of this section.

Thus, a member, who is otherwise entitled to benefits, must file an application and terminate his membership before he may retire on disability. And to terminate employment, a member who is on leave-without-pay status must sever that relationship.<sup>3</sup> See Att'y Gen. Op. 88-19 (1988) ("leave of absence" denotes continuity of the employment relationship). After satisfying these conditions, the disabled member who has received Subsection 10-11-10(A)(5)'s certification of entitlement may commence receiving benefits.

Because current law repealed the provisions allowing retroactive benefits, the Public Employees Retirement Association may not award disability benefits retroactive to the date the member's name last appeared on the payroll with pay.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) Former law also provided limited retroactivity for superannuation (normal) retirement benefits. Subsection 10-11-22(A) NMSA 1978 (1986 Cum. Supp.) provided: "Any member may retire for superannuation on or after his voluntary retirement date upon his written application filed with the retirement board.... The annuity to which a member shall be entitled shall begin the first day of the calendar month next following his termination of employment but not more than one month prior to his filing of a written application for retirement." (Emphasis added.) Thus, if an employee terminated employment several months before applying for benefits, he might receive one month's retroactive benefits.

[n2](#) The opinion also recites the other statutory requirements that must be satisfied to receive retirement benefits: (1) employment termination and (2) requisite age and service.

[n3](#) We understand that in most cases the disabled member, after exhausting his sick leave, is placed on leave-without-pay status while his benefit application is pending. The member then terminates that status when he is notified that his benefit application has been approved by the medical committee. Because the medical committee meets

monthly, our opinion assumes timely action by that committee upon a member's application for disability benefits that is supported by adequate medical information.