

## **Opinion No. 90-09**

April 30, 1990

**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**

Is PERA Rule 1000.30, providing for suspension of disability benefits if a member is capable of resuming gainful employment, invalid as being in conflict with NMSA 1978, § 10-11-11(C) (Repl. Pamp. 1987)?

### **CONCLUSIONS**

No. PERA Rule 1000.30 is consistent with the statutory scheme governing the grant and continuation of disability benefits and is a reasonable implementation of § 10-11-11(C).

### **ANALYSIS**

The public employees retirement board ("PERB") adopted PERA Rule 1000.30 to implement the disability provisions of the public employees retirement act ("PERA"), NMSA 1978, §§ 10-11-1 to -140 (Repl. Pamp. 1987 and Cum. Supp. 1989). That rule provides that disability benefits will be suspended if the medical committee of the public employees retirement association ("Association") finds that the disabled member is capable of resuming gainful employment.<sup>1</sup> "Gainful employment" means "remunerative employment or self employment that is commensurate with the applicant's background, age, education, experience and any new skills or training the applicant may have acquired...." PERA Rule 1000.10(A)(5). Section 10-11-11(C) provides: "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." The question is whether § 10-11-11(C) obliges PERB to continue disability payments to disability retirees who, although capable of resuming gainful employment, are unable, nevertheless, to perform the work required of the positions from which they retired on disability.

The question arises from the long-established dual standards that apply to the initial grant of disability benefits and to continuation of disability benefits. To receive disability initially, the medical committee must find that the applicant is "totally incapacitated for continued employment with the affiliated public employer" and that the "incapacity is likely to be permanent." § 10-11-10(B). A member's inability to continue in his

employment means that he is unable "to fulfill the required duties of the position in which the member was last employed by his or her affiliated public employer." PERA Rule 1000.10(A)(4). Thus, in awarding disability, the focus is upon the ability of the member to do the work he or she was doing for his public employer when disability occurred. But when a disability retiree is reexamined, the focus is not upon that retiree's ability to return to his former work, e.g. as a policeman, fireman, or heavy equipment operator, but rather is upon the disability retiree's ability to engage in gainful employment.

Since 1954, PERA's disability benefit provisions have embodied those two standards.<sup>2</sup> Under 1987 N.M. Laws, ch. 253 (PERA's recodification), the review standard upon reexamination is not stated as precisely as former law. But § 10-11-11(C) does not withdraw from PERB the ability to determine when disability retirees "no longer meet" the requirements for continuation of disability retirement. It is not inconsistent with that section to use the "gainful employment" standard. And it is consistent with § 10-11-10(E) to use that standard. Section 10-11-10(E) requires disability retirees to submit to the Association "a statement of earnings from gainful employment," and if those earnings exceed the amount that the federal social security administration allows, that section requires that benefits be suspended for the months of July through December.

To construe § 10-11-11(C) as requiring PERB to continue disability benefits to a member who is capable of engaging in gainful employment is wholly foreign to PERA's statutory scheme governing disability benefits, would be a radical departure from former law, is inconsistent with § 10-11-10(E), and would amount to reading into PERA's statutes significant obligations against the Association's funds that the Legislature has not contemplated. PERB's disability pension roll has increased significantly during the last eight years.<sup>3</sup> Were PERB required to continue disability benefits throughout the life of members who otherwise could engage in gainful employment, the Association's funds could be depleted to an extraordinary extent. The Legislature has not mandated that result. Moreover, PERB's disability retirees would have little incentive to seek rehabilitation so that they might become gainfully employed. Such disincentive is inconsistent with PERA Rule 1000.00: "It is the policy of the PERB to encourage continued employment of members... while providing protection in the case of disability. To this end, vocational rehabilitation is strongly recommended in every case possible." Providing lifetime disability benefits would not encourage members, who might benefit, to seek vocational rehabilitation.

Accordingly, we advise that PERA Rule 1000.30 is consistent with the statutory scheme governing the grant and continuation of disability benefits and is a reasonable implementation of § 10-11-11(C).

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) PERA Rule 1000.30(G) provides:

Any disability retiree who is subject to periodic reevaluation must be determined to be totally incapacitated for any gainful employment in order for disability retirement benefits to be continued. Such determination must be made by the medical committee subject to approval by the board....

PERA Rule 1000.50 recites similarly the "gainful employment" standard applicable to benefit suspension.

[n2](#) 1953 N.M. Laws, ch. 162, §§ 17-19 (awarding disability to a member who is unable to work for his public employer and suspending those benefits if the disability retiree is able to resume employment with any public employer); 1981 N.M. Laws, ch. 135, § 16 (clarifying the phrase "any public employer" to mean "gainful employment").

[n3](#) In 1981, the number of disability retirees was 353, with an annual payroll of \$1.39 million. In 1989, that number was 758, with an annual payroll of \$4.5 million.