

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

August 25, 2021

Francis Page
Acting Board Chair
Public Employees Retirement Association of New Mexico
33 Plaza La Prensa
Santa Fe, New Mexico 87507

Re: Office of the Attorney General Opinion letter concerning PERA Deduction of Dues from PERA Retirement Benefits for RPENM and AFSCME Members and Reimbursement of PERA's Administrative Costs for the Dues Deduction.

Dear Chair Page,

You have requested an Attorney General opinion seeking clarification about whether the Public Employees Retirement Association of New Mexico ("PERA") may:

- (1) Deduct annual dues each July from the pension benefits of certain PERA retirees who are members of the Retired Public Employees of New Mexico ("RPENM") and the American Federation of State and County Employees Retirees ("AFSCME") and have requested such dues deduction, and forward these dues to RPENM and AFSCME; and
- (2) Be reimbursed for PERA's actual administrative costs for the dues deductions by RPENM and AFSCME in accordance with the attached Memorandums of Understanding and Scopes of Work?

Based on our examination of relevant constitutional, statutory, and case law authorities, as well as the information available to us at this time, PERA appears to possess the legal authority to deduct RPENM and AFSCME dues from pension benefits of PERA members who are also members of both, as outlined in the Memorandums of Understanding ("MOU")¹ and Scopes of Work ("SOW")². Further, we conclude that PERA may also deduct the administrative costs of such dues deduction by PERA, again pursuant to the MOU and SOW provided.

I. Relevant law

Because PERA has its origins in the state constitution, we begin our analysis with an examination of the various legal authorities that govern PERA, including the New Mexico Constitution, New Mexico statutes,

¹ The MOU sets forth the terms between PERA and RPENM, specifically that PERA will remit union membership dues for RPENM members on an annual basis and PERA will withhold from members the costs of administering such a remittance program. This agreement and its terms form the factual predicate for this opinion.

² The SOW sets forth the duties and obligations between PERA and RPENM, specifically outlining how PERA will administer the dues remittance process for the benefit of RPENM members. These duties and obligations as outlined, like the MOU, form the factual predicate for this opinion.

the New Mexico Administrative Code, and New Mexico court decisions.

a. New Mexico Constitution

The New Mexico Constitution speaks directly to PERA and its Fund in Article XX, § 22, which states, in relevant part:

“Expenditures from a system trust fund shall only be made for the benefit of the trust beneficiaries and for expenses of administering the system. A system trust fund shall never be used, diverted, loaned, assigned, pledged, invested, encumbered or appropriated for any other purpose.”

N.M. Const. art. XX, § 22(A).

Parsing the text of this constitutional provision, we find that PERA has two primary duties, subject to a handful of particular restrictions. These primary duties are to ensure expenditures from the PERA Fund are only (1) made to benefit PERA Fund beneficiaries, and (2) used to cover expenses of administering the Fund system. PERA is strictly barred from using beneficiary funds for any other purpose other than the two stated duties.

Unfortunately, no New Mexico court has had the opportunity to address the application of Article XX, § 22 to legal questions similar to those posed by PERA for purposes of this opinion, although parties have asserted Article XX, § 22 as support for suits in cases involving claims against PERA for unlawful salary and benefit raises (*Retired Pub. Emps. of New Mexico, Inc. v. Propst*, No. 20-2063, 2021 WL 1259392, at *3 (10th Cir. Apr. 6, 2021); breaches of fiduciary duties by PERA (*Pub. Emps. Ret. Ass'n of New Mexico v. Clearlend Sec.*, No. CIV 11-0931 JB/WDS, 2012 WL 2574819, at *1 (D.N.M. June 29, 2012); and improper denial of a claim for survivor benefits (*Martinez v. Pub. Emps. Ret. Ass'n of New Mexico*, 2012-NMCA-096, ¶ 2, 286 P.3d 613, 6160, among others. All cases reiterate the text of Article XX, § 22 as clear and unambiguous.

Next, Article XX, §22(D) states, in relevant part:

“Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.”

N.M. Const. art. XX, § 22(D). In analyzing the language of this provision, we see that retirees who meet the statutory requirements for retirement acquire a vested and constitutionally protected property right in the Fund.³ In other words, once the property right in the Fund vests for statutorily permissible retirees, that vested property right is extraordinarily resistant to legal attacks or legislative changes, giving near plenary ownership to the beneficiary. See *Pierce v. State*, 1996-NMSC-001, ¶ 42 (the Public Employees Retirement Act (PERA), Judicial Retirement Act (JRA), Magistrate Retirement Act (MRA), and Educational Retirement Act (ERA) grant employees a substantive right to receive retirement benefits upon meeting certain requirements).

Finally, Article XX, §22(B) imposes a fiduciary duty and responsibility on PERA “for administration and investment of the trust fund held by” it. A fiduciary duty is one in which the duty holder must “act candidly to disclose material facts and to deal openly, honestly and fairly with” those to whom the duty is owed.” *McMinn v. MBF Operating Acquisition Corp.*, 2007-NMSC-040, ¶ 53. “A fiduciary is also obligated by the duty of loyalty and a duty to avoid self-seeking and self-dealing conduct.” *Id.*

b. Statutes and Regulations

³ For clarity, Black’s Law Dictionary defines “vested” as “[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional, absolute.” *Black’s Law Dictionary* 1595 (8th Ed. 2004).

i. Public Employees Retirement Act.

PERA is governed by the Public Employees Retirement Act (“Retirement Act”). NMSA 1978, §§ 10-11-1 to -142. Upon lengthy review, we find that the Retirement Act does not contemplate or address deductions from the Fund for purposes of paying retiree dues for union memberships or anything similar thereto. It simply is silent on the matter.

ii. PERA Regulations

In reviewing PERA’s regulations, found in N.M. Admin. Code 2.80.100 through 2300, again we find a dearth of guidance concerning the questions presented. For example, the Remittance Contribution provisions do not address any kind of deductions from sums to be remitted to beneficiaries; the same applies to the Member Contributions or Retired Member provisions. N.M. Admin. Code 2.80.500, 2100, and 1100. The only applicable information found in the PERA regulations is N.M. Admin. Code 2.80.700.10(F) and (G), which outline the retirement process that triggers remittance of benefits to beneficiaries.

iii. Canvass of other state’s legal position

For the sake of thoroughness and in a search for additional, informative guidance from other states, we researched the laws of other states, including Colorado, Utah and Illinois to see if these might address the questions presented. Colorado and Utah are states similarly situated to New Mexico and Illinois maintains a voluminous body of law on the issue of public sector unions and affiliated pensions. Unfortunately, our canvass of law for those three states turned up nothing useful for purposes of this opinion.

II. Analysis

From a practical perspective, Article XX, § 22 of the New Mexico Constitution provides a black-letter roadmap for PERA in dealing with the questions presented. First, PERA is a fiduciary for all contributing and retired members. Article XX, § 22. A fiduciary duty is arguably the highest duty in American law and that position is supported by the idea that the duty encompasses a duty of loyalty to beneficiaries. The request for this opinion is a good example of compliance with the duty of loyalty in that PERA is seeking to determine whether a subsection of its beneficiaries may exercise certain power over their vested property interests. PERA’s fiduciary duty, through the lens of the questions presented, would potentially require PERA, barring any legal hurdles, to fulfill the beneficiaries’ requests.

Article XX, § 22(A) sets forth the operation duties of PERA vis-à-vis the subject beneficiaries. PERA must manage its Fund to benefit beneficiaries while also covering operational expenses. In this instance, union membership certainly appears to be beneficial to those seeking dues deductions from their respective benefit amounts. While we have no black-letter law either prohibiting or permitting the sought-after practice, if PERA elects to proceed under the MOUs and SOWs, PERA may reasonably assert that, in so doing, it is managing the Fund properly as required under Article XX, § 22(A), at least based on the facts as presented. Furthermore, if the beneficiaries consent in writing to absorbing the administration costs that accompany the deductions and subsequent remittances to the unions, the subject beneficiaries are knowingly and willingly accepting those administrative costs, which would also appear to comply with Article XX, § 22(A).

Turning to Article XX, § 22(B), PERA’s fiduciary duty is reinforced by the fact it is managing, insofar as this opinion, vested property interests of retired beneficiaries. As discussed above, vested property rights to PERA contributions are near ironclad, meaning that outside statutory or regulatory changes (which may be deemed unconstitutional, depending on how those laws impact PERA), PERA beneficiaries enjoy substantial control over their benefits. Failure to accommodate reasonable deduction requests that also contemplate beneficiary absorption of administrative costs could be viewed by a court as a breach of PERA’s fiduciary duty and a violation of constitutionally protected vested property rights of the beneficiaries. Article XX, § 22(D) reinforces the strength of vested property rights, should Article XX, § 22(A) otherwise be unclear on the matter.

Next, we address the various statutes and regulations that govern PERA such as the Public Employee Retirement Act and N.M. Admin. Code 2.80.100 through 2300. As previously noted, these laws, while comprehensive, do not address deductions of the nature proposed in the questions presented. Neither do these laws contain provisions through which an analogy might be drawn. Thus, we are left almost exclusively with

the language found in Article XX, § 22 of the New Mexico Constitution to evaluate the questions presented.

When a statute does not address a particular issue or topic relevant to the subject matter of the statute, New Mexico Courts must address the legislature's silence on that issue or topic. *Swink v. Fingado*, 1993-NMSC-013, ¶ 29. In doing so, courts must consider a litany of factors to determine the impact of such legislative silence through statutory interpretation. *Id.* at ¶ 30. Such factors include determining the legislative intent behind the statute, the objective the legislature sought to accomplish, reading the law harmoniously and consistently with itself through a plain reading of the law, and policy considerations for the law. *Id.* at ¶ 30, *see also Nat'l Union of Hosp. Emps. v. Bd of Regents*, 2010-NMCA-102; *Wegner v. Hair Prod. of Texas*, 2005-NMCA-043, ¶ 7. Courts will not read into a statute that which is not found in the law, particularly when the law is coherent as drafted. *Giddings v. SRT-Mountain Vista, LLC*, 2019-NMCA-025, ¶ 20, *citing Regents of Univ. of New Mexico v. New Mexico Fed'n of Tchrs.*, 1998-NMSC-020, ¶ 28. Finally, the legislature has the power to add language to a statute, if it so wishes. *Cordova v. Cline*, 2021-NMCA-022, ¶ 9.

Turning first to the Public Employee Retirement Act, the Act lacks an express legislative intent provision to clarify the purpose of the Act. However, in examining the organization of the Act's provisions and the titles of those provisions, it is likely uncontroversial to state that the Act provides for a state-based retirement program for state employees, including outlining administration of such a program and permitting PERA to develop its own rules and regulations pursuant to the Act. The Act in no way addresses remittance of member union dues by agreement or operation of law. The Act, however, does contain a few provisions that permit PERA to issue payments out of a member's benefits. For example, **Section 10-11-121 allows PERA to tender payments for members enrolled in group health or life insurance plans. Sections 10-11-14.5 and -134 permit PERA to issue survivor benefits to surviving spouses upon the death of member. Section 10-11-136.1 requires PERA to withhold child support payments owed by members. These specific examples, while not on-point, demonstrate that the legislature considered the need to have PERA either withhold or remit certain payments for members. Additionally, it does appear that the policy purpose behind the Act is ensure that members benefit from a state-backed retirement plan that accounts for membership needs, including remittance or withholding of funds on behalf of members. The legislature apparently understood it had the power to add or remove remittances or withholdings as it saw fit, but did not contemplate remittance of union dues; likewise with a prohibition on those actions. Thus, with the Act's silence on the matter of union due remittance, the Act does not prohibit such remittances by PERA for the benefit of its membership.**

A similar situation arises out of PERA's regulations, which like the Act does not directly address issues presented. In discerning the intention of PERA's regulations, Section 10-11-130(A) sets forth PERA's statutory authority and duties which include rule promulgation to carry out such duties. Thus, it stands to reason that PERA adopted its rules and regulations with the intention of adhering to Section 10-11-130, especially when there is no evidence we are aware of to the contrary. As with the Act, there are provisions similar, but not identical, to the issue of remittance of union dues for the benefit of members. For example, N.M. Admin. Code 2.80.2000 provides standards for PERA's withholding of child support obligations. N.M. Admin. Code 2.80.900 addresses pre-retirement survivor benefits and how such benefits are to be administered. Based on PERA's historical rulemaking and the current regulations in effect, PERA understood it had the power to address remittances or withholdings of member funds, but ultimately did not issue any such rules or prohibitions on those actions.

Having established that, given the legislature's silence on the issue of remitting union dues and that New Mexico case law suggests that there is no prohibition on such remittances in light of such legislative silence, we finally examine the MOU and SOW. The MOU states that PERA historically deducted and remitted RPENM membership dues for those members who are also RPENM members, indicating the practice is not recent, although it remains unclear how long PERA engaged in this practice. The length of this practice might be useful in analyzing how many times the legislature had an opportunity to address remittance of union dues but chose not to do so. The MOU further explains that both PERA and RPENM wish to continue this exact practice into the future. Further, the MOU sets out two specific action items: that PERA will continue to withhold and remit RPENM dues from PERA members and that PERA will deduct the costs of doing so from the withheld and remitted due amounts. The SOW reiterates the two key aspects of the MOU, but provides

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additional administrative information, including how those members of RPENM may cease the withholding and remittance process for that member and how PERA shall determine the administrative costs for the remittance process.

Applying the law as outlined above to the MOU and SOW, it appears there are no existing legal prohibitions to the execution of either document or to the terms contained therein. We base this opinion on the silence of the legislature concerning dues withholding and remittance, the various canons of statutory construction adopted by New Mexico courts, and the absence of any PERA regulation addressing the issues presented.

III. Conclusion

Based on the various authorities discussed and analyzed above, we believe a New Mexico court may find that PERA possesses the legal ability to deduct RPENM and AFSCME dues from pension benefits of PERA members who are also members of RPENM and AFSCME, as outlined in the Memorandums of Understanding (“MOU”) and Scopes of Work (“SOW”). Further, we conclude that PERA may also deduct the administrative costs of such dues deduction by PERA, again pursuant to the provided MOU’s and SOW’s.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

Christopher Moander
Assistant Attorney General

Cc: Susan Pittard, Esq., General Counsel