

## **Opinion No. 57-84**

April 30, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilario Rubio, Assistant Attorney General

**TO:** Floyd Santistevan, Director, State Education Retirement Board, State of New Mexico, Santa Fe, New Mexico

### **QUESTIONS**

#### QUESTIONS

Can a person, who is contributing to the Public Employees Retirement Association now and on through effective date of Educational Retirement Act, hold membership in both the Educational Retirement Act (§ 20, Chap. 197, N.M. Session Laws 1957) and in the Public Employees Retirement Association (§ 5-5-1 to § 5-5-23, N.M.S.A., 1953 Compilation) by refusing to exempt himself from membership under Educational Retirement Act?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

Section 20, Chapter 197, New Mexico Session Laws of 1957, reads as follows:

"Nothing contained in the Educational Retirement Act shall be construed to effect in any manner membership in or coverage under the retirement programs pursuant to Sections 73-12-26 and 73-12-30 New Mexico Statutes Annotated, 1953 Compilation relating to institutional programs, or the program for the retirement of public employees pursuant to Sections 5-5-1 through 5-5-23 New Mexico Statutes Annotated, 1953 Compilation if persons covered thereunder who are in positions of employment on the effective date of the Educational Retirement Act elect to exempt themselves from membership under the Educational Retirement Act by filing written declaration of exemption with the director not later than December 1, 1957.

"Persons who enter employment after the effective date of the Educational Retirement Act and who are covered under such other retirement program may exempt themselves from membership under the Educational Retirement Act by filing written declaration of exemption with the director not later than six months after commencement of their employment.

"In the event election of exemption is not filed as herein provided, all such persons shall continue to be members under the Educational Retirement Act and the state of New Mexico shall no longer be responsible directly or indirectly for the payment of contributions or other payment on behalf of, or benefits to such persons, except as provided in the Educational Retirement Act.

"Persons who have exempted themselves from membership shall be allowed to withdraw the contributions they have made to the fund."

The second paragraph of § 20, Chapter 197, New Mexico Session Laws of 1957 provides that as a member of the Educational Retirement Act a person may elect to exempt himself from the Educational Retirement Act provided he files his written exemption not later than six months after commencement of employment.

The third paragraph of § 20,

Chapter 197, New Mexico Session Laws of 1957 specifically provides that in the event an exemption is not filed as herein provided, all such persons **shall** continue to be members under the Educational Retirement Act; that the State of New Mexico shall no longer be responsible directly or indirectly for payment of contributions or other payment on behalf of, or benefits to such persons, except as provided in the Educational Retirement Act.

Paragraph 7 of § 5-5-1, N.M.S.A., 1953 Compilation, under the heading "Definitions" reads as follows:

"'Employee' means any person, including any elected official, who is in the employ of any public employer and whose salary is paid by warrant or any other medium from any income of said public employer. The term 'employee' shall not include any person who is a beneficiary of any other retirement, pension or annuity plan created and established by the state of New Mexico or any of its political subdivisions."

The mandatory language of the above paragraph of § 5-5-1, N.M.S.A., 1953 Compilation, specifically prohibits a member of PERA from becoming a beneficiary of any other retirement, pension, or annuity plan created and established by the State of New Mexico or any of its political subdivisions.

The other two questions propounded to us in your letter of April 23, 1957 do not need to be answered, since our conclusion to question one is in the negative.