

Opinion No. 64-69

May 27, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James E. Snead, Assistant Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees' Retirement Association, 403 Don Gaspar, Santa Fe, New Mexico

QUESTION

STATEMENT OF FACTS

The Office of United States Property and Disbursing Officer, now called United States Property and Fiscal Officer, is charged, in general, with handling the interests of the Federal Government with regard to property and disbursements of the Federal Government to the respective State National Guards. The appointment of a person to fill the office is the responsibility of the Governor of the State of New Mexico with the approval of the Secretary of Defense. The relevant State Statute is 9-2-6, N.M.S.A., 1953 Compilation. The relevant Federal Statute is Chapter 134, § 67, June 3, 1916, 39 Stat. 200. Both of the above statutes were set out in full and discussed in detail in Opinion No. 63-130 dealing with the same subject matter as the present opinion. Suffice it to say that under these statutes such officer is appointed by the Governor with the approval of the Secretary of Defense.

Colonel William A. Poe served as Adjutant General's Department Supply and Fiscal Officer during the martial law period from August 28, 1933 until December 23, 1933 at Gallup, New Mexico. From January 1, 1934 to July 31, 1934 he was employed at the New Mexico Western College, Silver City. From August 1, 1934 to December 23, 1941 he served as the United States Property and Disbursing Officer in the New Mexico Adjutant General's Office. From December 24, 1941 to February 19, 1946 he was on active duty in the United States Armed Service. From February 11, 1946 to November 30, 1957 he was again United States Property and Disbursing Officer with the New Mexico Adjutant General. From August 11, 1963 to September 7, 1963 he served the Adjutant General's Department as historian. The above listed service amounts to 24 years and 5 months. Colonel Poe was paid both by the Federal and State Governments as United States Property and Disbursing Officer for his service in such office until September 15, 1940. After that time, any pay he received as United States Property and Disbursement Officer was from the Federal Government although he was at all times under the control of the Governor. This office is informed that United States Property and Disbursement Officers are not paid from funds specifically earmarked for the respective state National Guards, but are paid from the same funds from which other Officers in the Armed Forces are paid.

By letter of September 12, 1957 Colonel Poe stated to the Public Employees' Retirement Board his desire to retire under the Public Employees' Retirement Act of New Mexico. This Office ruled in Opinion No. 57-294 that where Colonel Poe's salary had been paid by the Federal Government he was not eligible for membership in the Public Employees' Retirement Association of New Mexico. However, in 1959 the New Mexico Legislature amended such act to admit those persons paid from funds "allocated" to the National Guard of this State. See 5-5-1 (G), N.M.S.A., 1953 Compilation (P.S.). By Opinion No. 63-130 this office held that Colonel Poe was eligible for credit for the service as United States Property and Disbursing Officer through 1940 during which time he was paid from funds both of the State and Federal Governments, but ruling was specifically withheld on his service after that time where the Federal Government exclusively paid his salary. By Opinion No. 64-8 this office held that the Public Employees' Retirement Board was required to charge the same rate of interest to Colonel Poe in order for him to obtain back service credits as it did anyone else, and that such interest must be charged until the time the payment for such credits was made. However, no interest is required for payments representing employer contributions for back credit.

QUESTIONS

1. Under the above statement of facts, is Colonel Poe eligible for service credits for his service as United States Property and Disbursing Officer after 1940 when the Federal Government paid his salary?
2. Does the Public Employees' Retirement Board have authority to retire Colonel Poe retroactively as of April 15, 1959?

ANSWERS

1. Yes.
2. No.

OPINION

ANALYSIS

The above stated facts have been the source of four separate Attorney General's Opinions since 1957. The unique status of the United States Property and Disbursing Officer in relation to State Governments and the state of the law in New Mexico regarding the Public Employees' Retirement Act has given rise to much controversy since Colonel Poe first requested to retire as of April 15, 1959. The statutory section under which Colonel Poe, as well as all other persons, must come to qualify for membership in the Public Employees' Retirement Association in Section 5-5-1 (G), N.M.S.A., 1953 Compilation (P.S.). This Section provides as follows:

"G. '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 shall include full time civilian employees employed through direct appointment or designation by the governor as commander-in-chief of the national guard or by the adjutant general and whose salaries are paid by the United States from funds allocated to the national guard of this state.**"

Although Colonel Poe has insisted both before the Public Employees' Retirement Board, and by letter that his status under Section 9-2-6, N.M.S.A., 1953 Compilation whereby he is appointed by the Governor of the State in and of itself qualifies him for membership in the Association, it is clear from the above quoted statute that he must not only be appointed by the Governor, but he must also be either paid by this State or by the United States from funds allocated to the National Guard of this State. By Opinion No. 57-294 this office held that service as United States Property and Disbursing Officer did not qualify the officer for membership in the association. This opinion correctly interpreted the law as it stood at the time, since in 1957, when the opinion was issued, the language underlined in the above quoted statute was not present. Such language was added by amendment by the legislature in 1959. Such language was not present as of April 15, 1959.

By Opinion No. 63-130 this office held that at least through 1940 Colonel Poe was eligible for membership in the Association. This Opinion dealt largely with the fact that until 1940 the United States property and disbursing officer was paid from state funds. The latter opinion further noted the confusion existing in the law regarding the status of such officer. See **Woodford v. United States**, 77 F.2d 861 which held that such officer was a Federal employee, and **United States v. Prager**, No. 16478, 5th Cir., which indicated that such officer was a state employee. Based on the fact that the officer was paid almost equally from funds of the state and federal governments, along with the control exercised over him by the adjutant general and the governor of the state, the opinion concluded that at least until 1940 such officer was eligible for retirement under the P.E.R.A.

The question then is squarely presented, and the facts for determination are laid. Absent the fact of state payment, and conceded the fact of state control, is Colonel Poe entitled to membership in the Public Employees' Retirement Association?

The issue to be determined to settle this question is that of interpreting the meaning of "funds allocated to the national guard of this state" in Section 5-5-1(G) supra. There can be no doubt of the control over the officer by the State executive. Further, the appointment of such officer to protect the United States' interests in the State National Guards is required under the National Defense Act mentioned in the Statement of Facts. See Chapter 134, Section 67, Laws 1916, 39 Stat. 200. As was pointed out in Opinion No. 63-130, the Judge Advocate General and the United States Comptroller have had numerous occasions to consider the status of the Property and Disbursing Officer and the Judge Advocate General has stated that:

"These opinions generally conclude that property and disbursing officers are State, rather than Federal Employees."

These officers are both in aid of the state and the Federal Government, as are most National Guard Members. They not only protect the Federal Government's interests, but also aid the states in disbursing to them the allocations of the Federal Government to State National Guards. This statement is reinforced by the fact that until 1940 both State and Federal Governments contributed approximately equally to the salaries of such officers. There is no indication that the Officer's function changed when the Federal Government undertook to pay all of their salary.

Although the Officer is paid from a different appropriation than that used to pay the salaries of National Guard Members, this is no reason to say that the salary of the property and disbursement officer is not "allocated" to the state the same as any other funds for the benefit of the National Guard. The services of the Officer are both for the State National Guard and for the Federal Government. The services of members of the National Guard are also for the benefit of the state and Federal Governments, and their salaries are paid by the Federal Government. We can see no material difference between the two situations requiring a decision that one person was intended to be allowed membership in the Association and the other was not. To our way of thinking they are both paid from funds allocated to the National Guard of this state. There is nothing in the act or elsewhere indicating an intention on the part of the legislature to distinguish between the two types of persons, and in the absence of such indication we are compelled to conclude that Colonel Poe comes within the amendment, as do National Guard Members. Such conclusion rests, of course, upon the peculiar facts of this situation. First the Officer is required by Federal law to be appointed to the states in order for them to participate in the Federal funds for National Guard activities; secondly he is under the control of the executive of the state; thirdly his salary is paid by the Federal Government at least partially for the benefit of the National Guard of the state.

The second question is whether the Public Employees' Retirement Board can retire Colonel Poe retroactively as of August 15, 1959. A conclusion in the affirmative would present such questions as whether the Association must now pay Colonel Poe all annuities since that date, and whether any interest due would continue until the present date or would be cut off as of 1959. The equitable argument for retroactive retirement is that the Board erred in not retiring Colonel Poe on his original request in 1957. Such decision by the Board was on the advice of the Attorney General dealing with the law as it was at that time. We first point out that such advice was entirely correct in our view since the law at that time required that an "employee" be paid from state funds. There was no exemption for persons paid from funds allocated to the national guard of this state. Since Colonel Poe seeks now to take advantage of a change in the law since the date of his application, and since there was no error in the original ruling of the Board, the equitable argument is without merit. Further, as was pointed out in Opinion No. 64-8, retirement is not effective until payment by the member of all moneys required to derive contributing service credits. Further, as pointed out in Opinion No. 64-8, the interest continues to run until the principal is re-paid. Our information, submitted by

Colonel Poe, and contained in the files of the Public Employees' Retirement Board indicates that such principal was not tendered to the Board by Colonel Poe until December of 1963. Further, several Sections of the Act indicate that a person does not become a member of the association until such time as he actually contributes to the fund. We see no authorization in the Act for the Board to allow any person to retire retroactively. In fact the Act implies the contrary. A person does not become a member of the Association, and is not entitled to benefits thereof until such time as he contributes money owing. It is our opinion that Colonel Poe cannot be retired retroactively as of April 15, 1959.

We repeat our conclusion in Opinion No. 64-8 that such contributions must be with interest at the regular rate established by the Board, which is presently 4%