

**Opinion No. 65-29**

February 17, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Mr. John C. Hays, Executive Secretary, Public Employees Retirement Association, 113 Washington Avenue, Santa Fe, New Mexico

**QUESTION**

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Are members of the State Highway Commission eligible for membership in the Public Employees Retirement Association?

CONCLUSION

Not at present.

**OPINION**

{\*53} ANALYSIS

Section 5-5-1(G), N.M.S.A., 1953 Compilation (P.S.) defines employees 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."

Section 55-2-1, N.M.S.A., 1953 Compilation (P.S.), as amended in 1963, provides as follows:

"REIMBURSEMENT OF STATE HIGHWAY COMMISSIONERS. The members of the state highway commission shall receive per diem and mileage as provided in the Per Diem and Mileage Act, and shall receive no other compensation, perquisite or allowance."

{\*54} Prior to this amendment the section read as follows:

"The members of the state highway commission, as compensation for their services, shall receive the sum of fifteen dollars (\$ 15.00) per day while actually engaged in the discharge of their duties as members of the state highway commission and shall also receive reimbursement for travel expenses at the rate of eight cents (\$ .08) per mile for

attending meetings or traveling in connection with their duties, except while traveling in stateowned vehicles or aircraft."

Perhaps prior to the amendment in 1963 it could be reasonably argued that the fifteen dollars per day was "salary." However, since the 1963 session changed the terminology to "reimbursement", it certainly implies that the twenty dollars is for "out-of-pocket" expenses.

There are a number of other provisions which show a definite legislative intent that board and commission members who receive per diem only are not to be covered by the Public Employees Retirement Act. For one thing, members of the association contribute to the fund. "Contributing member" is defined in Section 5-5-1(K), N.M.S.A., 1953 Compilation (P.S.) as ". . . any member who is making contributions to the employees savings fund by payroll deductions and for whom an affiliated public employer is making payments to the employers' accumulation fund."

In the case of board and commission members who draw per diem only, there is no payroll deduction for the "employee's" contribution; neither do the various boards and agencies budget and pay money for the "employer's" share.

Another provision in the Public Employees Retirement Act, specifically Section 5-5-7, N.M.S.A., 1953 Compilation (P.S.), limits service credit by providing that "in no case shall any member be credited with (1) a month of service for less than fifteen days of service in any calendar month, or (2) a year of service for less than twelve months of service in any calendar year."

It is thus our opinion that there is no legislative sanction for board and commission members who draw per diem and mileage only to become members of the Public Employees Retirement Association -- this no matter how many days the person devotes to board and commission duties.

Should the legislature so desire, it could amend the Public Employees Retirement Act to cover such persons. It could provide the necessary funds for employer contributions and it could give credit for previous service upon fulfillment of certain conditions by the board or commission members. This is basically what the legislature did in the legislative retirement act. Section 5-5-6.1, N.M.S.A., 1953 Compilation (P.S.)