

Opinion No. 80-32

August 28, 1980

OPINION OF: Jeff Bingaman, Attorney General

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TO: Frank Ready, Director, Educational Retirement Board, Lamy Building, Santa Fe, New Mexico 87503

RETIREMENT

No educational retirement payments are due the designated beneficiary of a member (of the educational retirement association) where that member, having chosen a normal life annuity, died after the effective date of his retirement but before receipt of any benefit payments.

FACTS

The application for retirement of a member of the educational retirement association was approved by the Director of the Educational Retirement Board on September 19, 1977, retirement to be effective on October 1 of that year. On October 15, the member died without having received any retirement benefits. The Educational Retirement Board ratified the Director's approval of the application for retirement benefits on November 18, 1977. The member had selected a normal life annuity which pays benefits only for the life of the annuitant.

QUESTIONS

Are any educational retirement payments due the designated beneficiary of a member where that member, having chosen a normal life annuity, died after the effective date of his retirement but before receipt of any benefit payments?

CONCLUSIONS

No.

ANALYSIS

The normal life annuity selected by the annuitant provides a full benefit to a member with no provision for either a refund of contributions or annuity payments to a beneficiary. Benefits to an annuitant's beneficiaries could be paid pursuant to Section 22-11-29 NMSA 1978 which provides, in part:

"At any time on or after becoming eligible to retire pursuant to the Educational Retirement Act [22-11-1 to 22-11-45 NMSA 1978] but on or before actual retirement, a member may elect to receive the actuarial equivalent of his retirement benefit to be effective on his retirement in any one of the following optional forms:

Option A. A reduced annuity payable during the member's life with the provision that in the event of the death of the member before the benefits paid to him have equaled the amount of his accumulated contributions to the fund, the balance shall be paid to the beneficiary or beneficiaries designated in writing to the director by the member, or if no beneficiary was designated, to the estate of the member.

Option B. A reduced annuity payable during the member's life with the provision that upon the {**180*} member's death, the same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option.

Option C. A reduced annuity payable during the member's life with the provision that upon the member's death, one-half of this same annuity shall be continued during the life of and paid to the beneficiary designated by the member in writing at the time of electing this option."

OPINION

However, no annuity is payable to a beneficiary in this case because no option to provide such a benefit was selected.

A refund of contributions is not payable because option A was not selected and further because the member died subsequent to the effective date of his annuity. Section 22-11-15(B) NMSA 1978 provides:

". . . If the member dies prior to the effective date of his retirement, and if no option has been selected, . . . his surviving beneficiary, if any, or the member's estate, is entitled to a refund of the member's contribution. . . ."

Thus, the death of a member who has chosen a normal life annuity after the effective date of his annuity will yield no educational retirement payment in the form of refund or annuity to a beneficiary of that member. Receipt of an annuity is not critical to the determination of whether the statutory effective date of that member's retirement has been met prior to his death.

Section 22-11-28 NMSA 1978 provides, in part:

"B. Retirement pursuant to the Educational Retirement Act [22-11-1 to 22-11-45 NMSA 1978] shall become effective on July 1 following approval of the application for retirement by the board. With approval of the board and the local administrative unit

employing the member, retirement pursuant to the Educational Retirement Act may become effective on the first day of any month during the year."

Educational Retirement Board Rule V, Section E, provides:

"The Director of Educational Retirement is authorized to approve duly executed applications for age and service retirement on behalf of the board in order to insure timely approval of same; however, all such approvals must be ratified by the Educational Retirement Board at a subsequent meeting of the Board."

Board Rule V, Section D, states, in part:

". . . Whenever a retiring member terminates at a time other than at the end of the academic year for which he has been contracted or employed, the effective date may be the first day of the month following termination . . ."

The effective retirement date of the member's retirement in this case was October 1. No optional benefits were selected by the member. Therefore, no annuity or refund is owing the beneficiary.

Notwithstanding the language in Board Rule III, Section C(1) which provides for a refund of contributions to the surviving beneficiary "in the event of the death of a member **prior to his having received** any retirement or disability benefit," Section 22-11-15 NMSA 1978 is controlling, and the effective date of a member's retirement is determinative. To the extent that Board Rule {**181*} III, Section C(1) conflicts with Section 22-11-15 NMSA 1978, it is invalid.

We note that a sum of money representing 15 days of a monthly annuity payment was owing to the decedent at the time of his death. Payment of this sum should be made to the personal representative of the decedent or to the person claiming entitlement as provided in Section 45-3-1201 NMSA 1978.

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