

## **Opinion No. 81-16**

July 24, 1981

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** Roger W. Crist, Secretary, Corrections Department, 113 Washington Avenue, Santa Fe, New Mexico 87501

### **PUBLIC OFFICERS AND EMPLOYEES; RETIREMENT**

Synopsis: The responsibility for an employee's share of his contribution to a retirement benefit plan must ultimately remain with the employee.

### **FACTS**

Pursuant to the Public Employees' Retirement Act, Sections 10-11-1, **et seq.**, NMSA 1978, "state police members" contribute a larger percentage of their compensation than do "regular members," and, in return, receive larger benefits. For over a year, correctional officer specialists have participated in the public employees' retirement association as "regular members." It has now been determined that such officers must participate as "state police members," see Opinion of the Attorney General No. 81-3, dated March 19, 1981, and that the difference between the contributions required of "state police members" and the contributions which these officers were assessed as "regular members" must be paid into the members contribution fund.

### **QUESTIONS**

Can the Corrections Department relieve the correctional officer specialists of any obligation to makeup the additional contributions required of "state police members" of the public employees' retirement association for the period during which the officers were assessed as "regular members?"

### **CONCLUSIONS**

No.

### **ANALYSIS**

A public employee's entitlement to retirement benefits under the Public Employees' Retirement Act is dependent upon his having made payroll deduction contributions in an amount prescribed by law for his membership class. See, Section 10-11-8 NMSA 1978. A correctional officer specialist who participated in public employees' retirement association as a "regular member" must now make up the difference between the

contributions which were deducted from his compensation as a "regular member" and those which he would have been required to pay as a "state police member."

## OPINION

The question here is raised in light of the Corrections Department's proposal to pay that difference on behalf of its employees. The Department has suggested that since the employees were not responsible for having payroll deductions assessed at "regular member" rates rather than at "state police member" rates, they should not be obliged to make up the difference. Notwithstanding the good intentions of the Department, such a proposal is precluded by Article IX, Section 14 and Article IV, Section 27 of the New Mexico Constitution. This conclusion would not, however, prevent the Department from advancing the additional {244} contributions on behalf of the employees, so long as the employees reimbursed the Department.

Article IX, Section 14 prohibits the state from making . . . "any donation to or in aid of any person. . . ." For purposes of Article IX, Section 14, a donation has been defined to mean a gift or allocation of something of value without consideration. **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 303 P.2d 920 (1956). In **State ex rel. Hudgins v. Public Employees Retirement Board**, 58 N.M. 543, 273 P.2d 743 (1954), the Court held that increased retirement benefits paid in consideration for additional contributions by the annuitants were not donations. However, as there would be no consideration to the Department for making additional contribution payments on behalf of an employee, such contribution payment would be an impermissible donation.

Regardless of the special circumstances, correctional officer specialists are not exempt from the prohibitions of Article IX, Section 14. In **State ex rel. Sena v. Trujillo**, 46 N.M. 361, 129 P.2d 329 (1942), the Court, in holding that a retired state employee could not claim pension benefits authorized by law enacted ten years after he left state service, explained:

"It is not enough that we can say that a public purpose is being served when we donate to those who have performed for the state a valuable public service over a period of 30 consecutive years. The constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all. . . ." 46 N.M. at 369.

Similarly, it is not enough that correctional officer specialists are not at fault for being classified as "regular" rather than "state police" members. An outright gift by the state of an employee's share of his retirement plan contribution is a donation in aid of a person and prohibited by Article IX, Section 14. See, also, **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957).

Article IV, Section 27 provides that

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered. . . ."

In Opinion of the Attorney General No. 71-44, dated March 10, 1979, this office concluded that the prohibition against extra compensation applied to state agencies and departments as well as to the legislature. As the additional employee contributions required of correctional officer specialists now classified as "state police members" would ordinarily have been deducted from compensation, payment of such contributions by the department rather than by the employee is effectively payment of extra compensation.

In short, the responsibility for an employee's share of his contribution to a retirement benefit plan must ultimately remain with the employee, whether he pays in one lump sum or reimburses the employer who advances the contribution on the employee's behalf. An employee may not be relieved of the obligation to pay that which should have been paid for pension benefits he will receive. **Campbell v. Board of Administration of Public Employees' Retirement System**, 163 Cal.Rptr. 198, 103 Cal.App.3d 565 (1980).

#### **ATTORNEY GENERAL**

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