Opinion No. 87-13

March 25, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Leroy R. Warren, Assistant Attorney General

TO: Mr. Leonard Valdes, Executive Secretary, Public Employees' Retirement Association, PERA Building, Santa Fe, New Mexico 87504

QUESTIONS

1. May a magistrate member of the Public Employees' Retirement Association, reelected in November for a new term commencing January 1, qualify for retirement benefits by resigning from his then-current position during the period between the election and the new term?

2. May a magistrate who concurrently serves as a municipal judge, who is a member of the Public Employees' Retirement Association in both positions, and who is reelected as a magistrate in November for a new term commencing January 1, qualify for retirement benefits by resigning from the municipal position during the period between the election and the new term?

CONCLUSIONS

1. No.

2. No.

FACTS

Two factual situations have been presented for review. In the first, a magistrate member of the Public Employees' Retirement Association (PERA) was reelected last November for a new term commencing January 1, 1987. The magistrate division to which he was reelected differs from the division previously served, although both divisions are in the same magistrate district. The correspondence furnished this office on February 6, 1987, discloses that, on November 10, 10986, the magistrate advised the administrative office of the courts that he would resign from his then -- current magistrate position in the district November 30, 1986, to exempt himself from PERA membership pursuant to Section 10-11-9(E) NMSA 1978.

ANALYSIS

In the second situation, a magistrate was reelected last November for a new term commencing January 1, 1987. At the time, the magistrate also served as a municipal

judge. In both positions, he was a member of PERA. The correspondence furnished on February 6 discloses that the magistrate resigned from the municipal position effective December 30, 1986, and that he asked to be deleted from the PERA rolls on the effective date of that resignation.

FACTS

Both magistrates have applied for retirement annuities under the Public Employees' Retirement Act (Act), Sections 10-11-1 to 10-11-38 NMSA 1978. Each also has executed an irrevocable exemption from PERA membership for his reelection term pursuant to Section 10-11-9(E). Neither is eligible for retirement benefits under the Magistrate Retirement Act.

ANALYSIS

Several sections of the Act apply to the first situation described above. Section 10-11-9(E) provides:

An annuitant retired under the provisions of Section 10-11-22 NMSA 1978 who becomes an elected official on or after January 1, 1981, including those officials elected to serve a successive term commencing January 1, 1981, may continue to receive his annuity without suspension of benefits during the term of office for which he was elected; provided that the annuitant files with the retirement board, within thirty days of becoming an elected official...an irrevocable exemption from membership for the official's term of office...

Section 10-11-22(A) NMSA 1978 provides:

Any member may retire for superannuation on or after his voluntary retirement date upon his written application filed with the retirement board setting forth the first day of the calendar month after his termination of employment with his affiliated public employer that he decides to be retired.... The annuity to which a member shall be entitled shall begin the first day of the calendar month next following his termination of employment....

Section 10-11-22(D) NMSA 1978 provides: "Except as provided in Subsection E of Section 10-11-9 NMSA 1978, any superannuation retirement annuity payable to any annuitant shall be suspended if the annuitant is again employed by a public employer...." Section 10-11-1(Z) NMSA 1978 provides that ""retirement' means a member's withdrawal from the service of an affiliated public employer with an annuity granted under the Public Employees' Retirement Act."

Section 10-11-9(E), which permits annuitants who become elected officials to continue to receive their annuities, is, in effect, an exception to the general annuity suspension provision in Section 10-11-22(D). Its evident purpose is to encourage persons to run for elective offices after their retirements, and, consequently, it benefits an individual

already "retire" and already receiving an annuity at the time that individual "becomes an elected official." Further, once qualified, the annuitant may "continue to receive his annuity without suspension of benefits."

It is our opinion that the resignation of the magistrate, which was effective November 30, did not qualify him for the annuity authorized by Section 10-11-9(E). While New Mexico courts have not decided the specific issue presented here, the New York Supreme Court considered the same issue in Baker v. Regan, as State Comptroller and Administrator of the New York State Employees' Retirement System, 114 A.D.2d 187, 498 N.Y.S.2d 557 (1986). In that case, the petitioners filed for retirement benefits between the date of reelection to their respective judicial offices in November and the following January 1, when their reelection terms commenced. New York law also provided for exceptions to the general annuity suspension requirement, including an exception for persons accepting "an elective public office." In ruling against the petitioners, the court majority said:

The 'elective public office' exception to this suspension of retirement benefits is intended to encourage qualified retirees go run for public office after their retirement.... Considering the purpose of the legislation as a whole and construing the statute consonant with the presumption that no unjust or unreasonable result was intended [citation omitted], we hold that the 'elective public office' exception contained in Civil Service Law § 150 prior to the 1984 amendment did not apply to petitioners, all of whom filed for retirement from their judicial offices after their reelection to such offices and before the commencement of their new term in such offices....

In short, it would be irrational to conclude that the Legislature intended to encourage public officers to commence serving terms in public offices to which they already had been elected before their retirement. Rather, as noted above, the legislative intent behind the exception is to encourage retired public officers to run for elective office....

Annuity benefits allowed by the Act are premised on "retirement," which is defined to mean "a member's withdrawal from the service of an affiliated public employer with an annuity granted under the Public Employees' Retirement Act." Section 10-11-1(Z). A retirement because of a resignation must be an effective resignation, i.e., one that actually results in withdrawal from the service of an affiliated public employer. In State ex. rel. Brown v. Hatley, 80 N.M. 24, 26, 450 P.2d 624, 626 (1969), the Supreme Court of New Mexico said:

A resignation by a teacher is in the nature of a termination of employment. However, it is ineffective without the necessary intent on the part of the incumbent to sever the relationship of employer and employee. Sherman v. Board of Trustee, p. 9 Cal. App. 2d 262, 49 P.2d 350 (135). Actually, it is conceded that Mrs. Brown's resignation was submitted only for the purpose of obtaining disability retirement. The superintendent knew that was the purpose, and the circumstances of the resignation, such as her illness, agreement to transfer, and the like are inconsistent with a true resignation.

When a teacher submits a resignation and the parties understand it is submitted for a purpose other than termination of employment, it is ineffective as resignation....

Cases from other jurisdiction support that position. For example, in State v. Hardy, 2 Ohio App. 2d 85, 206 N.E. 2d 589 (1965), the Ohio Court of Appeals held that, to constitute a complete and operative resignation, there must be intention to relinquish part of the term of office accompanied by an act of relinquishment. In Sherman v. Board of Trustees of Siskiyou Union High School, 9 Cal. App. 2d 262, 49 P.2d 350 (1935), the California court of Appeals held that a resignation to be effective at end of school year, accepted in June, and in place at the time of reemployment in August, was ineffective. It was not made for the purpose of terminating petitioner's employment, but was offered to avoid the effect of the tenure law and on the promise that she would be reemployed. In this case, because it appears that the exception provided in Section 10-11-9(E) motivated the resignation, because the resignation was submitted following reelection, and because it was submitted with the knowledge and under standing that services for the affiliated public employer would continue on January 1, 1987, we do not believe the resignation was effective or that the annuity benefit provided by Section 10-11-9(E) is available to the magistrate.

We also have examined the resignation in light of section 2, article XX, of the State Constitution, which provides that every officer, unless removed, shall hold his office until his successor is duly qualified. There is judicial authority under that constitutional provision that every officer holds his office until the successor is qualified, Haymaker v. State ex. rel. McCain, 22 N.M. 400, 163 P. 248 (1917), and, under similar provisions, that an appointment and qualification of a successor must precede an effective resignation. See e.g., Badger v. United States, 93 U.S. 599 (1977); Waycross v. Youmans, 85 Ga. 708, 11 S.E. 865 (1890). None addresses the effect of a resignation under the circumstances considered in this opinion, however, and, although we note it as an additional issue that arguably could prevent the resignation from being considered a true resignation, we need not rest our opinion on the constitutional provision. The statutes and authorities cited above resolve the question presented.

The second situation under review differs in that the annuity application assumes the resignation of a municipal position concurrently held by the magistrate, not the resignation of the position to which the magistrate was reelected. The Situation may be relatively unique, in that it involves a member who had been employed by two affiliated public employers during the same period of time. It is our opinion that the resignation does not qualify the member for a retirement annuity.

First of all, the exception concerning annuity benefits extended by Section 10-11-9(E) is not available in this situation. The resignation, effective December 30, 1986, was filed after the reelection and before commencement of the reelection term. Second, on the effective date of the resignation, there was no retirement within the meaning of the Act. See Section 10-11-1(Z). While service as a municipal judge was terminated on that date, the member at all times before, during, and after the resignation was in the service of an affiliated public employer as a magistrate.

Finally, the member apparently assumes that concurrent services for two or more affiliated public employees may be separated for purposes of retirement eligibility. The consequences of such an assumption are that a member could acquire multiple years of credited services for each year of actual service, establish more than one individual account in the employees' savings fund, and be entitled to more than one PERA annuity. We understand that PERA's administrative practices allow only one year of credited service for each year of employment, regardless of the number of employers; one individual account number in the employees' savings fund for each member; and one retirement annuity for each member. Section 10-11-14(A), 10-11-18(A)(8), 10-11-22, and 10-11-1(T) and (Z) amply support the administrative practices.

For the foregoing reasons, we believe both questions must be answered in the negative and that the exemptions purportedly filed pursuant to Section 10-11-9(E) must be disregarded.

Respectfully submitted,

ATTORNEY GENERAL

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