

Opinion No. 88-45

August 25, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Carlos A. Gallegos, Executive Secretary, Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

QUESTIONS

May a public employee purchase service pursuant to 1987 N.M. Laws, ch. 253, § 139, retire, and promptly return to public employment?

CONCLUSIONS

No.

ANALYSIS

1987 N.M. Laws, ch. 253, § 139 allowed members of the public employees retirement association to purchase service credit during the seventy-sixth fiscal year and to retire under the Public Employees Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987). Section 139, described vernacularly as the PERA "buy-out," provides:

A member may purchase not more than five years of credited service...subject to the following conditions:

- A. the member has five or more years of credited service...;
- B. the member reinstates all forfeited credited service;
- C. the purchase cost for each year of credited service purchased under the provisions of this section is an amount equal to the member's final average salary multiplied by the sum of the member contribution rate and the employer contribution rate for the coverage plan applicable to the member; and
- D. the purchase cost shall be paid to the association in one payment and the member shall retire the first day of the month following payment of the purchase cost.

(Emphasis added.) Section 139 modified and extended for one year former statutory buy-out provisions, Sections 10-11-14.1 to 10-11-14.4 NMSA 1978 (1986 Cum. Supp.).

Section 10-11-14.1 sets forth the Legislature's purpose in allowing members to buy service credit to retire:

The legislature finds that severance tax revenues from the energy and extractive industries are declining, and it is in the interest of the state as a consequence of these declines to minimize the state's costs and expenses. The state's costs and expenses can be reduced by encouraging the early retirement of employees having the highest salaries and longevity, and also by encouraging the professional development of and providing enhanced responsibilities to employees not having the highest salaries and longevity.

The benefit to the state and to other public employers that flows from the PERA buy-out, and thus the basic reason for the buy-out, is the savings that the state and other public employers realize by permanently retiring their higher paid, senior employees. Thus, a member's genuine "retirement" is indispensable to attaining and fulfilling the Legislature's goal. A member may not use Section 139 as a device to increase his service credit or to secure his ability to retire in the future if, without the buy-out, he will lack the requisite service to retire. The "final application for annuity" that members must sign when they retire reflects this intent. It reads: "[I]n making this application for retirement, I am doing so in good faith with the full intent of terminating permanently my employment with a public employer...."

Our office repeatedly has addressed this issue. In Att'y. Gen. Op. 88-26 (1988), we concluded that an elected official could not purchase service credit pursuant to this section and thereafter serve without pay the remainder of his elected term. We stated: "[The official,] should he purchase early retirement before June 1, 1988, must retire, i.e., terminate permanently his employment with McKinley County the first day of the month after he purchases this service." See Section 10-11-8(A) (a member may retire only after he terminates employment with all affiliated public employers). In Att'y. Gen. Op. 87-14 (1987), we concluded that a public employee who resigns on a Friday and is re-hired the following Monday does not "retire" within the meaning of PERA. We concluded in Att'y. Gen. Op. 87-14 (1987) that: "[A] member must terminate employment, withdraw from the service, and sever his employment relationship to obtain a public pension." Finally, in Att'y. Gen. Op. 87-37 (1987), we concluded that a public employee did not retire when he terminated his employment with the state on December 31, 1986, and resumed employment with the state on January 5, 1987. The employee, "in applying for retirement benefits, did not do so with the 'intent of terminating permanently [his] employment with a public employer,' as recited in his final application for annuity."

PERA does not specify the length of time that a retiree must remain out of public service to assure that his retirement is bona fide, i.e., that he applied for benefits with the requisite intent. And a member whose retirement is bona fide may return to public employment, subject to Section 10-11-8(C)'s suspension provision. The question of intent, in some cases, may be a disputed factual issue. However, a prompt return to public employment after retirement manifests a presumptive lack of the intent to

terminate permanently, particularly if the retiree returns to the same employment, and is contrary to the Legislature's purpose in allowing the "buy-out."

ATTORNEY GENERAL

HAL STRATTON Attorney General