

**Opinion No. 88-33**

May 17, 1988

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Andrea R. Buzzard, Assistant Attorney General

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

**QUESTIONS**

May the Public Employees Retirement Board excuse the statutory requirement that a member file a written application for retirement, because a member alleges that the member made verbal requests of the Public Employees Retirement Association for an application form but did not receive the form promptly?

**CONCLUSIONS**

No.

**ANALYSIS**

Section 10-11-8A NMSA 1978 (Repl. 1987) provides:

A member or vested former member may retire upon fulfilling the following requirements:

- (1) a written application for normal retirement, in the form prescribed by the association, is filed with the association prior to the selected date of retirement;
- (2) employment is terminated with all affiliated public employers prior to the selected date of retirement;
- (3) the member or vested former member selects a date of retirement which is the first day of a calendar month; and
- (4) the member or vested former member meets an age and service requirement for normal retirement specified in the coverage plan applicable to the member.

Section 10-11-119A NMSA 1978 (Repl. 1987) provides: "A normal ... pension shall commence the first day of the month following retirement." Thus, to retire, a member must file with the Public Employees Retirement Association ("Association") a written application for retirement, using the Association's form, before the desired retirement date. Normal retirement benefits are not retroactive. Section 10-11-119. The issue is

whether any other action can substitute for the actual physical delivery of a properly completed application form.

No New Mexico courts have construed Section 10-11-8A. Therefore, we look to other jurisdictions for guidance. In *Anderson v. South Carolina Retirement System*, 278 S.C. 161, 293 S.E.2d 312 (1982), the South Carolina Supreme Court refused to allow a disability retiree to draw benefits retroactive to the date of injury where she failed to file a successful application for benefits until approximately four years after her disabling injury. No statute authorized retroactive payments. The court stated:

"The right to retirement benefits is purely statutory and, in the absence of a provision in the statute directing otherwise, the right to benefits does not arise until an application is made and proof is submitted as the statute requires." See also *Dingel v. State Employees Retirement System*, 62 Pa. Comwlth. 79, 435 A.2d 664, 666-67 (1981) (a member's noncompliance with the Code's application procedures bars disability annuity; the Code "demands strict compliance with statutorily prescribed procedures").

A retirement application is "filed" as required by law when "it is actually received by the Retirement System.... There is no filing as required by law except by delivery to an official whose duty it is to receive papers for filing and who is required to maintain an office for their deposit." *McBride v. Regan*, 125 A.D. 2d 797, 798, 509 N.Y.S.2d 907, 908 (1986); *Levy v. Levitt*, 66 A.D.2d 948, 949, 411 N.Y.S.2d 710, 711 (1978); *Dolan v. Levitt*, 61 A.D.2d 1075, 1076, 403 N.Y.S.2d 134, 136 (1978); *Robillard v. Levitt*, 44 A.D.2d 611, 352 N.Y.S.2d 703, 704 (1974). Neither mailing an application, *McBride*; *Dolan*, nor delivering an application to a retirement board member is sufficient. In *re Gulick's Will*, 255 N.Y. 364, 174 N.E. 754 (1931). A retirement board's statutory authority to "adopt rules and regulations to prevent injustices and inequalities" does not allow it to waive deadlines to allow a member to purchase service credit. *Matter of Ford*, 52 N.C. App. 569, 573, 279 S.E.2d 122, 124 (1981).

These cases call for strict compliance with the statutory requirements for receiving retirement benefits. Verbal requests for an application form do not constitute the filing of an application. Accordingly, we conclude that the Public Employees Retirement Board may not, in the circumstances described, excuse the statutory requirement that a member file a written application for retirement.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General