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OPINION
OF
HAL STRATTON

Opinion No. 87-14

BY: Andrea R. Buzzard
Assistant Attorney General

TO: Honorable Timothy Z. Jennings
State Senator
P.O. Box 1797
Roswell, New Mexico 88202-1797

QUESTIONS:

1. Did Mr. Orlando Giron, who filed an application for retirement with P.E.R.A. on or about July 29, 1985, and commenced receiving a monthly annuity from P.E.R.A. effective August 1, 1985, retire from public employment in the manner prescribed by the Public Employees' Retirement Act?

2. If Mr. Giron did not properly retire from P.E.R.A., what is required to rectify the situation?

3. During the time Mr. Giron received retirement benefits, was the salary paid to him as an employee legal?

4. Is the advice of the Attorney General provided in February of 1985 with respect to a similar situation involving Mr. Giron applicable to his retirement effective August 1, 1985?

5. If legal action is required to rectify the situation, who should initiate it?

CONCLUSIONS:

1. No.

2. See analysis.

3. Yes.

4. Yes.

5. See analysis.

FACTS:

Before July 29, 1985, Mr. Orlando Giron was a member of the Public Employees' Retirement Association ("P.E.R.A.") and was an employee of the State Department of Education. Mr. Giron elected coverage under P.E.R.A. in the manner provided by section 22-11-17(D) NMSA 1978. Mr. Giron's "final application for annuity" filed with P.E.R.A. on or about August 29, 1985 recited, under oath, in part:

> I hereby certify that my termination date with Department of Education was or will be 7/31/85 and that in 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...
>
> I further agree that should I find it necessary to return to service with an affiliated public employer of the State of New Mexico, I will notify the Retirement Board before accepting such employment. I further understand that should I return to service, my annuity, in some instances, will be suspended during any period of employment with an affiliated public employer.

In connection with Mr. Giron's retirement, the Department of Education certified to P.E.R.A. that Mr. Giron had terminated employment with the Department of Education on July 26, 1985. Correspondence between Mr. Giron and the State Superintendent of Schools, Mr. Alan Morgan, reflects that Mr. Morgan was appointed State Superintendent of Schools effective July 29, 1985, a Monday; that Mr. Giron vacated the position of Acting State Superintendent of Schools as of 5:00 p.m. on July 26, 1985, a Friday; and, that Mr. Giron accepted the position of Deputy Superintendent in writing on July 29, 1985, which position Mr. Morgan offered to him in writing on July 29, 1985. Before becoming Acting Superinten-

dent of Schools on or about March 29, 1985, Mr. Giron served the Department of Education in the capacity of Deputy Superintendent.

ANALYSIS:

This office previously advised Mr. Giron on or about February 26, 1985, that he could not obtain a retirement annuity from P.E.R.A. by resigning as Deputy Superintendent of the Department of Education effective Friday, January 25, 1985, and by becoming rehired as Deputy Superintendent effective Monday, January 28, 1985. We rested our conclusion upon the fact that Mr. Giron had not effectively resigned his position.

As defined in the Public Employees' Retirement Act, "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 10-11-1 (Z) NMSA 1978 (1986 Cum. Supp.). The Department of Education is an "affiliated public employer" for those employees who may and do elect coverage under P.E.R.A. An annuity is granted to a member entitled thereto upon his written application filed with P.E.R.A. "setting forth the first day of the calendar month after his termination of employment with his affiliated public employer.... 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 (A) NMSA 1978 (1986 Cum. Supp.) (emphasis supplied).

Mr. Giron did not "withdraw" from the service of the Department of Education on July 26, 1985, or on any date subsequent thereto. Mr. Giron did not "terminate" his employment with the Department of Education on July 26, 1985, or on any date subsequent thereto. That Mr. Giron occupied different positions within the Department on July 26, 1985, and on July 29, 1985, is immaterial. In the context of a resignation by a teacher submitted only for the purpose of obtaining disability retirement, the Supreme Court of New Mexico has ruled that a resignation is ineffective to terminate employment without the necessary intent on the part of the incumbent to sever the relationship of employer and employee. State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969).

In Gozier v. State Personnel Board, 205 Cal. Rptr. 19 (Cal. App. 3 Dist. 1984), the court stated: "Retirement is the withdrawal from service with a retirement allowance. (Gov. Code, §20035) 'A person... never has simultaneous status as an employee and a retired person. Each status is mutually exclusive.'" Id. at 21. Further, the phrase "termination of employment" has been defined to mean "the complete severance of the relationship of employer and employee." Bliss v. Equitable Life Assur. Soc. of U.S., 620 F.2d 65, 69 (5th Cir. 1980); Moss v. Aetna Life Ins. Co., 228

S.E.2d 108, 111 (S.C. 1976). A resignation followed by an immediate rehiring without an interruption of service or employment has been held not to cause forfeiture of civil service status. In Re Homer's Appeal, 404 Pa. 184, 170 A.2d 848 (1961).

We conclude that a resignation constitutes a complete break in service and an absolute termination of relations. See 3 McQuillin, Municipal Corporations §12.122 (3d ed. 1982). While the intent of Mr. Giron to change positions within the Department is evident, any intent to sever the employment relationship with the Department is belied by the documentary evidence. No complete severance of that employment relationship occurred. Even if he had effectively severed his relationship with his public employer, "[a]ny superannuation retirement annuity payable to any annuitant shall be suspended if the annuitant is again employed by a public employer which is or which thereafter becomes an affiliated public employer." Section 10-11-22(D), NMSA 1978 (1986 Cum. Supp.). Mr. Giron does not come within any of the exceptions to this suspension requirement. Cf., e.g., Sections 10-11-23 NMSA 1978, 10-11-24 NMSA 1978, 10-11-9(E) NMSA 1978, 10-11-9.2 NMSA 1978 (1986 Cum.Supp.).

In Application of Smith, 108 N.J. Super. 315, 261 A.2d 371 (1970), modified on other grounds, 57 N.J. 368, 273 A.2d 24 (1971), the court stated:

> "It seems axiomatic that a public employee may not receive his full salary and, at the same time, receive a retirement disability pension... To hold otherwise would create the anomaly of paying salary to one as an employee while recognizing at the same time that he was not an employee, having retired from his employment."

261 A.2d at 372, 373. With respect to the situation at hand, it also seems axiomatic that Mr. Giron did not retire from the Department of Education but remained employed by the Department of Education.

That certain "provisional" members under the Educational Retirement Act are permitted to choose E.R.A. or P.E.R.A. coverage has no bearing upon the question at hand. Section 22-11-17(D) NMSA 1978 contemplates coverage either under E.R.A. or under P.E.R.A., but not both. That section does not state that a written election to obtain P.E.R.A. coverage while employed with the Department of Education later may be changed to secure E.R.A. coverage. Furthermore, such a change in coverage, if allowed, could not effect a termination of employment permitting retirement under P.E.R.A. while remaining employed but covered under E.R.A. To interpret

section 22-11-17 NMSA 1978 otherwise, would permit disparate treatment of employees of affiliated public employees. Pension acts should be construed as to avoid a result that is inequitable or favors one member over another. 3 McQuillin, Municipal Corporations §12.143 (3d ed. 1982).

The Supreme Court of New Mexico articulated the sound policy supporting a public pension system as follows:

> "[S]uch a pension system is an inducement to the able to enter the service of the State and for an equally good reason it is an inducement to those who have grown old in the service to step down and make way for the more efficient. Such good reasons suggest themselves to all upon simple reflection."

State ex rel. Sena v. Trujillo, 46 N.M. 361, 368, 129 P.2d 329 (1942). This policy underlies the clearly stated requirement of the Public Employees' Retirement Act that a member must terminate employment, withdraw from the service, and sever his employment relationship to obtain a public pension. We conclude that Mr. Giron's retirement was not in accordance with the Public Employees' Retirement Act, and benefits with respect thereto must cease.

We assume that Mr. Giron does not wish to retire in a manner that will permit him lawfully to receive his P.E.R.A. benefits, but desires to continue to draw his salary. In any case, however, whether Mr. Giron retires now or continues as a public employee, he should rectify his situation in the following manner: P.E.R.A. should calculate the amount of annuity payments made to Mr. Giron to which he was not entitled; advise him of the amount he owes to P.E.R.A.; and make certain Mr. Giron promptly submits repayment. Additionally, as Mr. Giron did not terminate employment with the Department of Education, all other termination benefits should be reimbursed. Further, it appears that Mr. Giron and the Department of Education may owe P.E.R.A. employer and employee contributions for the period of August 1, 1985 to the present date. Finally, in response to your additional inquires, our previous advice to Mr. Giron is applicable; during the time in which Mr. Giron was an employee, he was entitled to his salary, but not to retirement benefits; and should legal action become necessary to enforce payment of amounts due to P.E.R.A., the anticipated plaintiff in such a suit would be the state by and through the Public Employ-

ees' Retirement Association or the Attorney General on behalf of the state.

Respectfully submitted,

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