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OPINION
OF
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Opinion No. 88-15

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QUESTIONS:

1. Does Mr. Rudy A. Yardman qualify for retirement benefits under the Public Employees Retirement Act at the 2½% rate?
2. When do Mr. Yardman's retirement benefits commence?

CONCLUSIONS:

1. No.
2. On January 1, 1988.

ANALYSIS:

Mr. Rudy A. Yardman terminated his employment with the Highway Department on or about March 27, 1987. On or about October 8, 1987, Mr. Yardman, in a workmen's compensation suit, was adjudged 60% permanently partially disabled beginning March 27, 1987, arising out of an injury that occurred on September 21, 1984. Mr. Yardman meets the age and service requirements for a normal retirement pension under the public employees retirement act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978. Mr. Yardman filed an application for retirement benefits on December 29, 1987, specifying an effective date of January 1, 1988.

State general member coverage plan 2, providing the 2½% benefit formula, became applicable to state general members after September 30, 1987. Section 10-11-21. Mr. Yardman was not a

state member on or after that date, having severed his employment relationship on or about March 27, 1987.¹ Mr. Yardman therefore does not qualify for the 2½% benefit formula. PERA must calculate his benefits based on state general member coverage plan 1, the 2% benefit formula. Section 10-11-17.

If Mr. Yardman applied for and obtained PERA disability benefits, his pension amount would not differ from a normal retirement pension. Section 10-11-10(D) provides: "The amount of a disability retirement pension shall be calculated in the same manner as a normal retirement pension." Apart from the additional service credit given to duty disability annuitants who do not otherwise qualify for a normal retirement pension, normal and disability retirement pensions differ only in the suspension provisions. See Section 10-11-10(E) (suspension for July through December when earnings exceed amount that would cause decrease in social security benefits and for failure to file timely earnings statements). But where the disability-retired member meets the age and service requirements for a normal retirement pension, the suspension provision of Section 10-11-8(C), applicable to annuitants generally, governs. See Section 10-11-10(E) ("The provisions of [10-11-8(C) NMSA 1978]...shall be applicable in lieu of the provisions of this subsection if the disability retired member...meets an age and service requirement for normal retirement....").

Section 10-11-8(A) specifies the date that Mr. Yardman's benefits commence:

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

1 Were Mr. Yardman to resume employment with an affiliated public employer after September 30, 1987, he would be required to serve three years under coverage plan 2 to obtain the benefits of that plan, because of his break in service. See Att'y. Gen. Op. 87-66.

(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.

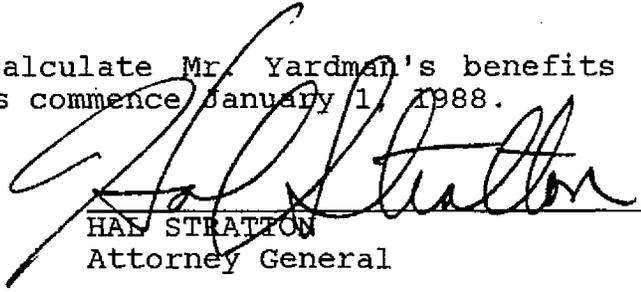
Section 10-11-119(A) provides:

A normal or disability pension shall commence the first day of the month following retirement. A preretirement survivor pension shall commence the first day of the month following the date of the death resulting in the pension. A postretirement survivor pension shall commence the first day of the month following the date of the death resulting in the pension.

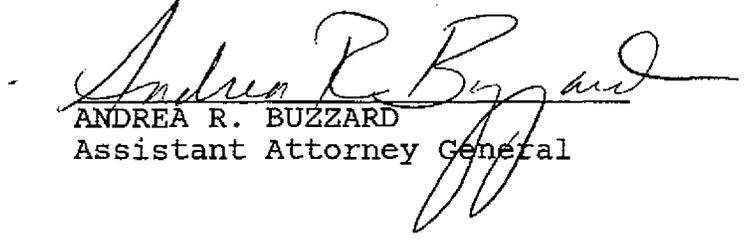
To retire, a member must terminate employment, meet the requirements for retirement, and file an application for retirement. His pension then would commence the first day of the month after he filed his application, the earliest date that a retiree may select.

The 1987 recodification of the public employees retirement act does not permit a normal or disability retirement pension to be made retroactive. Former law permitted retroactivity. See Section 10-11-22(A) NMSA 1978 (1986 Cum. Supp.) (repealed by 1987 N.M. Laws, ch. 253, §140) ("The annuity to which a member shall be entitled shall begin the first day of the calendar month next following his termination of employment but not more than one month prior to his filing of a written application for retirement."); Section 10-11-31(C)(2) NMSA 1978 (1983 Repl.) (repealed by 1987 N.M. Laws, ch. 253, §140) ("His [duty] disability annuity shall begin as of the date his name last appeared on an affiliated public employer's payroll."); Section 10-11-32(C) NMSA 1978 (1983 Repl.) (repealed by 1987 N.M. Laws, ch. 253, §140) ("His [nonduty] disability annuity shall begin as of the date his name last appeared on active payroll with pay or, in the case of an inactive vested member, the first day of the month following approval of his disability application by the board."). Under present law, the earliest date that normal or disability benefits may commence is the first day of the month following the date a member or inactive vested member files his application for benefits, provided all other requirements necessary to retire have been met.

Accordingly, PERA must calculate Mr. Yardman's benefits at the 2% rate, and those benefits commence January 1, 1988.



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