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OPINION
OF
HAL STRATTON
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Opinion No. 88-17

By: Andrea R. Buzzard
Assistant Attorney General

To: Leonard T. Valdes
Executive Secretary
Public Employees Retirement Board
P.O. Box 2123
Santa Fe, NM 87504-2123

QUESTION:

May Mr. Floyd Cooper obtain from the Public Employees Retirement Association ("PERA") a refund of the purchase cost of "overlapping" service credit?

CONCLUSION:

Yes.

FACTS:

Two municipal fire departments employed Mr. Cooper during the same period of time. The Clovis fire department has employed Mr. Cooper continuously since March 19, 1964. The Portales fire department employed Mr. Cooper from July 1, 1978 to October 26, 1984. Portales was an affiliated public employer while it employed Mr. Cooper. Therefore, while so employed, Mr. Cooper was a PERA member. Clovis became an affiliated public employer in August, 1982.

On June 30, 1983, Mr. Cooper entered into two contracts with PERA to purchase service credit for his years of Clovis employment before Clovis became an affiliated public employer. Mr. Cooper has not paid in full either contract. In one contract, Mr. Cooper

is purchasing thirteen years and five months of service credit for the period March 1, 1964 to July 31, 1977. In the other contract, Mr. Cooper is purchasing five years of service credit for the period August 1, 1977 to July 31, 1982.

Mr. Cooper's purchased service credit for the period July 1, 1978 through July 31, 1982 does not provide Mr. Cooper with additional years of service credit, since he already has service credit for that period as a result of his Portales employment. Rather, this purchase increases Mr. Cooper's PERA earnings for that period, which may affect his final average salary and thus his retirement benefits. The following table depicts Mr. Cooper's earnings while Portales and Clovis employed him:

	City of Portales	City of Clovis	Total
1978	\$ 4,110.00	\$14,509.52	\$18,619.52
1979	8,729.93	15,845.74	24,575.67
1980	9,783.60	17,676.93	27,460.53
1981	10,952.55	19,700.34	30,652.89
1982	13,059.68	21,736.39	34,796.07
1983	16,669.64	25,166.38	41,836.02
1984	18,526.90	26,944.63	45,471.53
1985		32,764.50	
1986	Approx.	35,000.00	

Mr. Cooper's highest earnings during a period of three consecutive years is from 1982 through 1984. Mr. Cooper therefore does not need purchased service to increase his earnings for the period 1978 through 1981. Mr. Cooper requests a refund of his purchase cost for this earlier period of service.

ANALYSIS:

The Public Employees' Retirement Act, Sections 10-11-1 to 10-11-140 NMSA 1978, does not discuss simultaneous employment with two affiliated public employers. A member may not increase, however, his credited service because of dual employment. See Section 10-11-4(A) ("In no case shall any member be credited with ... more than a year of service for all service in any calendar year"). Because the member and his employer must contribute to PERA during both employments, PERA regards that member as having "overlapping service." That member receives combined earnings upon which PERA may calculate the member's final average salary. In this situation, the member contributes twice to PERA, whether to his advantage or not, because PERA participation is mandatory for both employments.

In 1983, when Mr. Cooper contracted to purchase service credit for the period of August 1, 1977 to July 31, 1982 (a period for which he had maximum service credit, except for eleven months, because of his Portales employment), Section 10-11-9(C) NMSA 1978 (1983 Repl.) (repealed by 1987 N.M. Laws, ch. 253, §140) permitted a PERA member of a newly affiliated public employer to purchase "credited service" for periods of employment with that employer before it affiliated. During that excluded period of time, the employer had exempted itself and its employees from PERA participation, pursuant to 1947 N.M. Laws, ch. 167, sec. 2(3), amended by 1949 N.M. Laws, ch. 174, sec. 2(3). Under present law, a member also may purchase such excluded service. Section 10-11-4(D) provides: "Personal service rendered an affiliated public employer after July 31, 1947 but prior to that date the public employer became an affiliated public employer is prior service and shall be credited to a member ... [upon certain conditions]." PERA calculates service credit in months and years. Section 10-11-4(A); Section 10-11-14(A) NMSA 1978 (1986 Cum. Supp.) (repealed by 1987 N.M. Laws, ch. 253, §140). Here, Mr. Cooper is not purchasing "service credit" for the period July 1, 1978 through July 31, 1982. Rather, he is purchasing increased earnings.

Section 10-11-4(D) does not permit a member to purchase increased earnings. Section 10-11-4(E) provides:

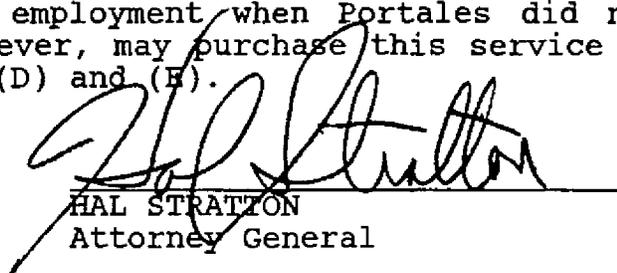
The amount of payment for each year of prior service being purchased under the provisions of Subsection D of this section is equal to the member contribution rate multiplied by the member's final average salary, both determined in accordance with the coverage plan applicable to the member at the time payment is made.

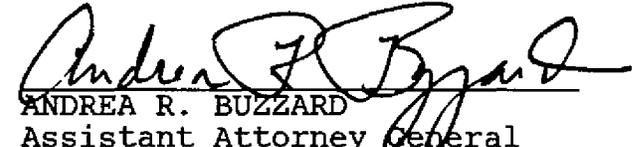
If a member could purchase "service credit" solely to increase his final average salary, then the purchase formula could not be applied in a reasonable manner. In essence, the member's cost for a higher final average salary would be based on his pre-purchase lower final average salary. Further, to allow a member to purchase, at a low rate, increased earnings which he thereafter may find unnecessary and as to which he might seek a refund, would invite manipulation and permit a member to adopt a "wait-and-see" attitude. He could ensure a low purchase cost and later seek reimbursement, if the purchase did not advantage him, because of subsequent events.¹ Mr. Cooper's purchase of Clovis service

1 We note, however, that Section 10-11-4 contains no provision permitting such refund. cf. Section 10-11-7(E).

credit for years for which he already had service credit is not consistent with Section 10-11-4.

Accordingly, we advise that Mr. Cooper's contract to purchase service credit for the years August 1, 1977 to July 31, 1982 must be canceled, and that the amounts Mr. Cooper paid for that credit must be refunded to him, together with the amount of interest that he has paid. See former PERA rule 600.20(c)(8) (filed Nov. 23, 1982).² This action effectively grants Mr. Cooper's request, except to the extent that he desires to retain service credit for the period from August 1, 1977 to July 1, 1978 (a period of excluded Clovis employment when Portales did not employ him).³ Mr. Cooper, however, may purchase this service in accordance with Section 10-11-4(D) and (E).


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- 2 We note that the PERA recodification, 1987 N.M. Laws, ch. 253, now forbids installment contracts. See Sections 10-11-4(E); 10-11-4(6); 10-11-7(D) (payment for various types of purchased service credit must be made within sixty days from the date PERA informs the member of the purchase cost).
- 3 A member purchasing service credit on an installment basis, however, could acquire no service credit until he paid the contract in full. See former PERA rule 600.20(C)(4) (filed November 23, 1982).