

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 74

RETIREMENT - Qualification of out-of-state public employment service within Public Employees' Retirement System (PERS);

RETIREMENT SYSTEMS - Qualification of service time earned in out-of-state public employment following qualification of prior Montana public service for purposes of Public Employees' Retirement System (PERS);  
MONTANA CODE ANNOTATED - Sections 19-3-401, 19-3-512, 19-3-701, 19-3-703, 19-3-704.

HELD: Reinstatement of membership in the Public Employees' Retirement System (PERS) with past service credit under section 19-3-704, MCA, does not preclude a member from earning credit under section 19-3-512, MCA, for non-PERS service which occurred during the period between initial membership and reinstatement of membership in PERS.

2 March 1988

Paul A. Smietanka, Counsel  
Public Employees' Retirement Board  
Department of Administration  
1712 Ninth Avenue  
Helena MT 59620-0131

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Dear Mr. Smietanka:

On behalf of the Public Employees' Retirement Board, you have requested my opinion on the following question:

Does a redeposit of refunded contributions to the Public Employees' Retirement System (PERS) under section 19-3-704, MCA, reestablish PERS membership at the beginning of the individual's earliest PERS service, such that the member is barred from qualifying out-of-state public service under section 19-3-512, MCA, that occurs subsequent to the original Montana service and prior to the current Montana service?

The Montana Public Employees' Retirement System (PERS) originated July 1, 1945, and became the first retirement program for Montana public employees. Under the program, members accumulate creditable service based on the length of time during which they and their employers regularly contribute to the PERS fund. Over the years PERS members have been given the opportunity to qualify different forms of public service for inclusion within their total amount of PERS creditable service. Generally, the statutory authority to qualify other service is conditioned upon the member's paying into the retirement fund the amount plus interest which would have been paid through normal contributions for the length of service being qualified.

A particular form of service qualification is provided for the person who becomes a member after his accumulated normal contributions have been refunded upon termination of a previous membership. A member who voluntarily terminates service may request and be paid his accumulated contributions. § 19-3-703, MCA. Those contributions are now typically 6 percent of one's total compensation. § 19-3-701, MCA. Following termination and refund of contributions, many former PERS members return to public employment. A 1973 amendment to the PERS statutes allows these individuals to "buy back" the prior benefits and creditable service that have been previously refunded. Section 19-3-704, MCA, states in pertinent part:

[A]ny person who again becomes a member subsequent to the refund of his accumulated normal contributions after a termination of previous membership is considered a new member without credit for any previous membership service. He may reinstate that membership service by redepositing the sum of the

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accumulated normal contributions which were refunded to him at the last termination of his membership plus the interest which would have been credited to his account had the refund not taken place. If he makes this redeposit, his membership shall be the same as if unbroken by such last termination.

In 1987 the Legislature approved House Bill 132 which provided PERS members an opportunity to qualify prior public service not subject to PERS. The opportunity is qualified by several conditions. The resulting statute provides in part:

A member with 5 or more years of creditable service in the public employees' retirement system may qualify up to 5 years of public service employment covered under a public retirement system other than a system provided for in Title 19 for which he received a refund of his membership contribution before becoming a member of the public employees' retirement system.

§ 19-3-512(1), MCA. The sponsor of the legislation explained that the bill's purpose was to allow a member of PERS to buy an additional five years of creditable service earned while working in another public employee retirement system including out-of-state public service, for which the member had received a refund. Minutes of Senate State Administration Committee, January 28, 1987, at 1.

The statute in question, § 19-3-512, MCA, is easily applied with respect to an individual with prior civil service not subject to PERS contributions who thereafter becomes a member of PERS for the first time and, after earning five years of PERS creditable service, seeks to qualify five of those years of non-PERS prior employment. Your opinion request, however, identifies a variation on this background which implicates not only section 19-3-512, MCA, but also section 19-3-704, MCA. You have indicated that the individual seeking qualification of the prior civil service was employed by Montana before leaving the state and obtaining employment subject to another public retirement system. This individual wishes to qualify the prior PERS service under section 19-3-704, MCA, and additionally qualify the non-PERS service under section 19-3-512, MCA. The individual who first qualifies the prior PERS service has membership "the same as if unbroken by such last termination" and, therefore, various PERS membership attributes relating back to the previous Montana

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employment. § 19-3-704, MCA. You suggest that a problem may thus arise for this individual when attempting to qualify the non-PERS service since section 19-3-512, MCA, requires the non-PERS refund be received before becoming a PERS member.

The primary purpose of the retroactive membership provisions of section 19-3-704, MCA, is to aggregate prior creditable service with current service time. Pension and retirement statutes should be liberally construed to the end that the beneficent aims of such legislation may be achieved. Wheeler v. Board of Administration, 149 Cal. Rptr. 336, 601 P.2d 598 (1979). The aim of the 1987 amendment to the PERS statutory scheme was to allow members to qualify prior non-PERS public service. Accordingly, I construe the condition in section 19-3-512, MCA, that receipt of a non-PERS refund occur "before becoming a member" of PERS to mean that the refund must occur before initiation of the membership from which the request for qualification arises. One becomes a member of PERS upon the first day of employment. § 19-3-401, MCA. Thus, as long as the member seeking non-PERS service credit received the refund in question prior to initiation of the present employment, credit for prior membership in PERS restored under section 19-3-704, MCA, will not preclude the opportunity to qualify non-PERS service under section 19-3-512, MCA.

THEREFORE, IT IS MY OPINION:

Reinstatement of membership in the Public Employees' Retirement System (PERS) with past service credit under section 19-3-704, MCA, does not preclude a member from earning credit under section 19-3-512, MCA, for non-PERS service which occurred during the period between initial membership and reinstatement of membership in PERS.

Very truly yours,

MIKE GREELY  
Attorney General