

OPINION NO. 91-046**Syllabus:**

R.C. 3309.41(C) does not require the School Employees Retirement System to terminate the retirement allowance of a disability retiree who serves as a member of a board of education.

To: Thomas R Anderson, Executive Director, School Employees Retirement System, Columbus, Ohio

By: Lee Fisher, Attorney General, October 31, 1991

You have asked for an opinion concerning recent changes in R.C. Chapter 3309, governing the School Employees Retirement System (SERS), with respect to disability retirees who also serve as members of boards of education. Your opinion request provides the following background information:

R.C. 3309.41(C), as amended by H.B. 382, eff. 6/30/91, provides, in pertinent part, that "[i]f a disability retiree is employed by an employer covered by this chapter, his retirement allowance shall cease." SERS has been asked both by SERS disability retirees who currently serve on boards of education and the boards upon which they serve if serving as a school board member requires SERS to terminate their disability retirement allowance.

It is unclear whether a SERS disability retiree who is a school board member is "employed by an employer" as provided under Division (C) of R.C. 3309.41. Under SERS law, school board members have always been deemed to be the "employer" rather than an "employee" of the "employer." For this reason, until the enactment of R.C. 3309.012 by H.B. 382, school board members could not contribute to SERS. School board members were not deemed to be "employees" and pursuant to R.C. 3309.23 as in existence prior to the enactment of H.B. 382, the membership of the SERS was comprised of "employees" as defined in R.C. 3309.01(B). School board members may now elect to contribute to SERS under R.C. 3309.012, but still are not included in the definition of "employee" under R.C. 3309.01(B).

Given these facts, you specifically ask:

1. Must SERS terminate the retirement allowance of a disability retiree who serves as a school board member?
 - a) Does whether the retiree's service as a school board member began before or after the enactment of H.B. 382 have any effect on whether SERS must terminate the retirement allowance?
 - b) If your response to the above questions is that SERS must terminate the retirement allowance, what should be the effective date of such termination?
2. Does an election to contribute to SERS on the school board service pursuant to R.C. 3309.012 have any effect on your answer to Question 1?
3. Does the disability retiree's refusal to accept any compensation for his service as a school board member have any effect on your answer to Question 1?
4. Do the provisions of R.C. 3309.41(C) prohibit a SERS disability retiree from running for election or reelection as a school board member?

Limitations Upon the Receipt of Disability Retirement Allowances

The focus of your inquiry is the effect of R.C. 3309.41(C) upon SERS retirees who are or wish to become school board members while on disability retirement. Disability retirement under SERS is provided for in R.C. 3309.39-.41. Concerning the status of, and limitations imposed upon, disability retirees, R.C. 3309.41 states in pertinent part:

(A) A disability retirant shall retain his membership status.¹ Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in [R.C. Chapters 124 or 3319]...

....
(C) *If a disability retirant is employed by an employer covered by this chapter, his retirement allowance shall cease and the annuity and pension reserves on his retirement allowance in the annuity and pension reserve fund shall be transferred from that fund to the employees' savings fund and employers' accumulation fund, respectively.*

....
(F) If disability retirement is terminated and a former disability retirant again becomes a contributor, other than as an other system retirant as defined in [R.C. 3309.341], to this system, the public employees retirement system, or the state teachers retirement system, and completes an additional two years of service credit after the termination of the disability retirement, he shall be entitled to full service credit for the period of disability retirement. (Emphasis and footnote added.)

You ask, therefore, whether a member of a school board is thereby "employed by an employer covered by this chapter," for purposes of R.C. 3309.41. If a disability retirant's service as a school board member is considered employment by an employer covered by R.C. Chapter 3309, R.C. 3309.41(C) would require that his retirement allowance cease.

Definitions of "Employer" and "Employee" in R.C. 3309.01

The terms "employee" and "employer," as used in R.C. Chapter 3309, are specifically defined. The definition of "[e]mployer" is set forth in R.C. 3309.01(A), and includes boards of education and school districts. The term "[e]mployee," as used in R.C. Chapter 3309, also is defined in R.C. 3309.01, as follows:

(B) "Employee" means all of the following:

(1) Any person employed by a public employer in a position for which he is not required to have a certificate issued pursuant to [R.C. 3319.22-.31];²

(2) Any person who performs a service common to the normal daily operation of an educational unit even though such person is employed and paid by one who has contracted with an employer to perform such services, and the contracting board or educational unit shall be the employer for the purposes of administering the provisions of this chapter;

(3) Any person, not a faculty member, employed in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the state or any political subdivision thereof, the board of trustees or other managing body of which shall accept the requirements and obligations of this chapter.

In all cases of doubt the school employees retirement board shall determine whether any person is an employee, as defined in this division, and its decision is final. (Footnote added.)

Thus, in order to be an "[e]mployee," as defined in R.C. 3309.01(B), a person must be employed by or in one of the entities named in R.C. 3309.01(B)(1)-(3). For the following reasons I conclude that a member of a board of education is an officer, and not an employee, for purposes of R.C. Chapter 3309.

¹ In contrast to disability retirants, persons who retire on a retirement allowance, as provided for in R.C. 3309.36-.38, cease to be members of the School Employees Retirement System. R.C. 3309.26.

² R.C. 3319.22-.31 concern the issuance of teachers' certificates of various grades and types.

A Member of a Board of Education Is an "Officer"

In *State ex rel. Landis v. Bd. of Commissioners*, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917), the Ohio Supreme Court set forth the following factors in determining whether a particular position is an "office," rather than an "employment," and whether a person holding that position is an "officer," and not an "employee":

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him....The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....
...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

Pursuant to R.C. 3313.09, members of boards of education generally serve four-year "terms of office." Further, each board of education member "shall take an oath to support the Constitution of the United States and the constitution of this state and that he will perform faithfully the duties of his office." R.C. 3313.10. Concerning vacancies in boards of education, R.C. 3313.11 states in part:

A vacancy in any board of education may be caused by death, nonresidence, resignation, *removal from office*, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment or election, removal from the district, or absence from meetings of the board for a period of ninety days.... (Emphasis added.)

Further, board of education members receive compensation in accordance with R.C. 3313.12. Finally, concerning the duties of school board members, my predecessor stated that: "The duties of a board of education are prescribed by various statutes, *see, e.g.,* R.C. Chapter 3313, and involve administration of the public school system, a sovereign function of government." 1986 Op. Att'y Gen. No. 86-004 at 2-16.

Thus, a member of a board of education is an officer, and, therefore, not an "employee," as defined in R.C. 3309.01(B). *See* 1985 Op. Att'y Gen. No. 85-036 (finding members of county boards of education to be public officers for purposes of Ohio Const. art. II, §20, which addresses, *inter alia*, fixing the term of office and compensation of all officers by the General Assembly); 1980 Op. Att'y Gen. No. 80-050 (same, concerning members of exempted school district boards of education). Consequently, a member of a board of education is not "employed by an employer covered by" R.C. Chapter 3309 for purposes of R.C. 3309.41(C). R.C. 3309.41(C), therefore, does not require SERS to terminate the retirement allowance of an SERS disability retiree who serves as a member of a board of education.

You have indicated in correspondence subsequent to your request that, should I conclude that an SERS disability retiree may serve as a school board member without forfeiture of his disability retirement under R.C. 3309.41(C), I need not address the remainder of your questions. Because I have so concluded, I will not address your remaining questions.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised, that R.C. 3309.41(C) does not require the School Employees Retirement System to terminate the retirement allowance of a disability retiree who serves as a member of a board of education.