

OPINION NO. 82-080**Syllabus:**

A member of the General Assembly who is a member of the Public Employees Retirement System cannot retire on monthly benefits under R.C. Chapter 145 between consecutive terms in the General Assembly.

To: William S. McLaughlin, Executive Director, Public Employees Retirement System, Columbus, Ohio
By: William J. Brown, Attorney General, October 26, 1982

You have requested my opinion on the following question:

May a member of the General Assembly retire on monthly benefits under Chapter 145, O.R.C., between consecutive terms in the General Assembly?

As only members of the Public Employees Retirement System ("PERS") may receive benefits from the retirement system, I shall assume your question refers to only those legislators of the General Assembly who have become members of PERS pursuant to R.C. 145.20. This statute, which provides that an elective official may become a member of PERS, states, in pertinent part, as follows:

Any elective official of the state of Ohio or of any political subdivision thereof having employees in the public employees retirement system shall be considered as an employee of the state or such political subdivision, and may become a member of the system upon application to the public employees retirement board, with all the rights, privileges, and obligations of membership.

The receipt of retirement benefits by PERS members is governed by R.C. 145.32 (age and service retirement) and R.C. 145.35 (disability retirement). Because your question states that the legislator would serve consecutive terms, such legislator would not be eligible for disability retirement as he would not meet the prerequisites of R.C. 145.35. This statute requires that a member of PERS be "mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent."

Pursuant to R.C. 145.32, a member of PERS is eligible for age and service retirement by attaining a certain age with corresponding years of service. Further, this statute states: "Service retirement shall be effective on the first day of the month immediately following the later of: (A) The last day for which compensation was paid; (B) The attainment of minimum age or service credit eligibility provided

under this section." Your request for my opinion appears to have arisen from a concern that a time gap between consecutive legislative terms may exist, and, as a result, a legislator may be entitled to retire because the payment of his compensation differs from his term of office.

Ohio Const. art. II, §2, which provides for the terms of state representatives and senators, states, in part, as follows:

Representatives shall be elected biennially by the electors of the respective house of representatives districts; their term of office shall commence on the first day of January next thereafter and continue two years.

Senators shall be elected by the electors of the respective senate districts; their terms of office shall commence on the first day of January next after their election. . . . Thereafter, except for the filling of vacancies for unexpired terms, senators shall be elected to and hold office for terms of four years. (Emphasis added.)

R.C. 101.27 provides for the payment of compensation to members of the General Assembly. This statute states in part:

Every member of the senate, except the members elected president, minority leader, senate president pro tempore, assistant minority leader, senate assistant president pro tempore, and minority whip, shall receive as compensation a salary of twenty-two thousand five hundred dollars a year during his term of office, and every member of the house of representatives, except the members elected speaker, speaker pro tempore, majority floor leader, assistant majority floor leader, majority whip, minority leader, assistant minority leader, and minority whip, shall receive as compensation a salary of twenty-two thousand five hundred dollars a year during his term of office. Such salaries shall be paid in equal monthly installments during such term. All monthly payments shall be made on or before the fifth day of each month. Upon the death of any member of the general assembly during his term in office, any unpaid salary due such member for the remainder of his term shall be paid to his dependent, surviving spouse, children, mother, or father, in the order in which the relationship is set forth in this section in monthly installments. (Emphasis added.)¹

Ohio Const. art. II, §2 expressly provides when the term of office of a member of the General Assembly commences and terminates. Under such provisions, no time gap exists between the termination of one term of office and the commencement of the next. R.C. 101.27 provides that a legislator is paid compensation for his term. Such compensation is co-extensive with the legislator's term, and for consecutive terms there would be no gap between days for which compensation is paid. The manner of payment of the compensation, i.e., monthly installments, does not create a gap as it merely describes when compensation is paid for the term. Accordingly, service retirement pursuant to R.C. 145.32 would not be applicable since there is no "last day for which compensation was paid" for consecutive terms.

The concept that there is a gap between terms may also arise based upon the date a legislator takes his oath of office. However, the statutory provisions

¹The excluded legislators are provided different amounts of compensation in R.C. 101.27.

relating to the oath of office, R.C. 101.01 and R.C. 101.11,² do not affect either the term or compensation of such office. R.C. 101.01 and R.C. 101.11 merely place the additional qualification requirement upon legislators that an oath of office be taken prior to undertaking their duties. See generally State ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109, 219 N.E.2d 729 (1966) (qualification relates to acts an official must perform before he enters upon the duties of his office). Thus, while the time when an oath of office is taken may affect when an elected official is deemed qualified to undertake the duties of his office, it has no practical effect upon when the term officially commences, where the term of office is expressly set by constitutional or statutory provision. Consequently, the fact that a legislator may not take an oath of office until the first Monday in January neither alters the fact that his term commences on January first, nor serves to create a time gap between the termination of one term and commencement of another.

Accordingly, it is my opinion, and you are advised, that a member of the General Assembly who is a member of the Public Employees Retirement System cannot retire on monthly benefits under R.C. Chapter 145 between consecutive terms in the General Assembly.

²R.C. 101.01 and R.C. 101.11 state, in part, as follows:

R.C. 101.01

(A) The first regular session of each general assembly shall convene on the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday. . . .

(B) At one-thirty p.m. of the day specified for the beginning of the first regular session of the general assembly, the president of the senate during the preceding biennium. . . shall also call the senatorial districts in their numerical order, and as they are called the persons claiming to be senators-elect therefrom shall present their certificates and take the oath of office. (Emphasis added).

R.C. 101.11

At two p.m. of the day appointed for the beginning of the first regular session of the general assembly, the speaker of the house of representatives during the preceding biennium. . . also shall call the districts in numerical order and, as they are called, the representatives-elect therefrom shall present their certificates and take the oath of office. (Emphasis added).