

OPINION NO. 85-037**Syllabus:**

A Public Employees Retirement System retirant who is re-employed pursuant to R.C. 145.382 may not continue to receive a retirement allowance during such re-employment.

To: M. L. McGee, Chairman, Ohio Board of Building Appeals, Department of Industrial Relations, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, July 11, 1985

I have before me your request for my opinion as to whether a retirant under the Public Employees Retirement System (hereinafter PERS) who receives an age and service allowance may, upon his appointment to the Ohio Board of Building Appeals, continue to receive his retirement benefits while so employed.

The Board of Building Appeals is established by R.C. 3781.19. It consists of three members who are appointed by the Governor with the advice and consent of the Senate. Each member is paid a per diem amount fixed pursuant to Chapter 124 of the Revised Code. R.C. 3781.19. You have indicated that the Board currently meets approximately one hundred days per year.

PERS is created and governed by R.C. Chapter 145. With certain exceptions not herein applicable, membership in PERS is compulsory for public employees. R.C. 145.03.

R.C. 145.01(A) defines "public employee" to mean:

Any person holding an office, not elective, under the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state university, or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division, or employed and paid in whole or in part by the state.

R.C. 145.01(B) defines "member" as, "any person included in the membership of the public employees retirement system." Pursuant to the terms of R.C. 145.01, members of the Board of Building Appeals are public employees and, therefore, are members of PERS.

R.C. 145.32 provides for voluntary and compulsory retirement of PERS members and, in pertinent part, states that:

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.

...Any member who accepts an allowance under Chapter 145. of the Revised Code, or who . . . is compelled to retire and who withdraws his accumulated contributions in lieu of accepting a retirement allowance is ineligible for regular re-employment in any capacity which comes within Chapter 145. of the Revised Code. (Emphasis added.)

R.C. 145.32 thus prohibits an individual from simultaneously receiving a retirement allowance and being regularly re-employed in a position which falls within the scope of R.C. Chapter 145.

R.C. 145.32 is limited, however, by other provisions of R.C. Chapter 145 which expressly address the re-employment rights of PERS retirants other than disability retirants. R.C. 145.381(A) is concerned specifically with a retirant who is elected to an office of the state or any political subdivision of the state, and, thus, has no application to the situation about which you ask. The remainder of R.C. 145.381 pertains to employment of retirants other than as elected officials and provides, in part:

(B) A retirant may be employed in a temporary capacity, not to exceed fifty-nine work days, or four hundred seventy-two hours, whichever is the lesser, within any calendar year, provided:

(1) The retirant has received a retirement allowance for at least two months.

(2) When employment does not exceed the limits of this division, there shall be no suspension or forfeiture of the allowance.

(3) Membership in the retirement system shall not be allowed a retirant employed under this division.

(C) A retirant may be regularly employed in full-time employment covered by this system provided he has received his retirement allowance for at least eighteen months. When a retirant is so employed:

(1) The employer shall notify the retirement board of such employment before the end of the month then current and any overpayment of allowance resulting from lack of notice shall be charged to the employer;

(2) The pension portion of the retirement allowance shall cease on the first day of the month following the date of such employment and shall thereafter be forfeited until the first day of the month following the termination of such employment;

(3) The annuity portion of the retirement allowance shall be suspended on the first day of the month following such employment, and thereafter shall accumulate to the credit of the retirant to be paid in one sum after his employment is terminated;

(4) Such an employee shall become a new member with all privileges and obligations of such membership, except that such new membership beginning on or after July 1, 1955, shall not include the survivor benefit rights provided by section 145.45 of the Revised Code.

(5) Upon service termination, a retirant may receive a refund of retirement deductions taken from his compensation during his re-employment, or he may receive a supplemental retirement allowance, based on contributions and service credit accrued subsequent to his termination of benefits.

Thus, R.C. 145.381(B) permits a retirant to retain his retirement allowance while re-employed in a temporary capacity, even though such employment falls within R.C. Chapter 145. A retirant so employed is not permitted, however, to re-establish membership in PERS. R.C. 145.381(B)(3). So long as the retirant is employed in a temporary capacity not exceeding fifty-nine work days or 472 hours, there is no suspension or forfeiture of his retirement allowance. R.C. 145.381(B)(2). When a retirant engages in regular full-time employment, R.C. 145.381(C) provides for the suspension or forfeiture of retirement benefits during such regular re-employment,¹ and PERS membership is re-established during such re-employment. Upon termination of the retirant's service, he may receive a refund of the retirement contributions deducted during his re-employment or he may receive a supplemental retirement allowance. No provision of R.C. 145.381 would enable a member of the Ohio Board of Building Appeals to exceed part-time employment, R.C. 145.381(B), and continue to receive a retirement allowance under PERS.

¹ Regular re-employment has been administratively defined as "re-employment of a retirant when expected tenure is for a period of more than fifty-nine days or 472 hours (whichever is reached first, depending on basis of pay) within a calendar year, provided the retirant has received his benefit for at least eighteen months." 1 Ohio Admin. Code 145-19-10(A)(3).

You have asked whether R.C. 145.382 may be construed to permit a member of the Ohio Board of Building Appeals who has been receiving retirement benefits pursuant to R.C. Chapter 145 to serve on the Board more than fifty-nine working days during each year, and continue to receive retirement benefits. R.C. 145.382 provides as follows:

(A) A former member receiving a retirement allowance, other than a disability allowance, from the public employees retirement system, and hereafter referred to as a retirant, may be employed, notwithstanding sections 145.381 and 145.46 of the Revised Code, if his later employment has been in a position described in any of the following categories:

(1) A position authorized by section 101.31, 121.03, or 121.04 of the Revised Code;

(2) A position to which appointment is made by the governor with the advice and consent of the senate;

(3) The head of a division of a state department.

A retirant employed in such a category is entitled to a retirement allowance based on his total contributions and service credit accrued during all service as a public employee.

(B) Upon his later retirement the retirant may elect to receive retirement benefits based upon his original service and his service after re-entering public service by selecting any of the optional benefit plans specified in section 145.46 of the Revised Code. (Emphasis added.)

R.C. 3781.19 provides that members of the Board of Building Appeals are appointed by the Governor with the advice and consent of the Senate. Thus, a member of the Board of Building Appeals falls within the purview of R.C. 145.382(A)(2). It is, however, necessary to ascertain the rights conferred upon a retirant pursuant to R.C. 145.382.

As aforementioned, R.C. 145.32 proscribes regular re-employment once retirement benefits have been accepted. R.C. 145.381 is an express exception to R.C. 145.32. Temporary re-employment is permitted under R.C. 145.381(B) if the retirant has received a retirement allowance for at least two months. Regular re-employment is permitted under R.C. 145.381(C) provided that the retirant to be re-employed has received his retirement allowance for at least eighteen months. R.C. 145.382 provides that retirants may be employed in one of the specified categories notwithstanding R.C. 145.381. Thus, R.C. 145.382 enables retirants to accept regular or temporary re-employment in any of the three specified categories of positions, irrespective of the requirements for re-employment imposed by R.C. 145.381, i.e., the individual need not have received retirement benefits for two months before temporary re-employment, see R.C. 145.381(B)(1), nor for eighteen months prior to regular re-employment, see R.C. 145.381(C).

R.C. 145.382 confers certain rights upon individuals who qualify for re-employment under its provisions. Such retirants are entitled to a retirement allowance based upon contributions and credits accrued during all public service. The retirement allowance is re-calculated based upon the combination of original service and service after re-entering public employment. R.C. 145.382(B). Further, because employment is permitted notwithstanding R.C. 145.46, such individuals may elect anew from the optional benefit plans of R.C. 145.46. The terminology of R.C. 145.382, however, is permissive; it is conceivable that a retirant may qualify for re-employment under R.C. 145.382 and either R.C. 145.381(B) or R.C. 145.381(C). In such a situation, the retirant would be able to elect the re-employment provision most advantageous to his individual position.

Although R.C. 145.382 addresses the allowance and benefits to which a person who is re-employed under that statute is entitled, R.C. 145.382 is silent as to whether a retirant who is re-employed may continue to receive his retirement allowance. I believe however, that by construing various provisions of R.C. Chapter 145, it may be ascertained that a retirant may not, under R.C. 145.382, continue to receive his retirement allowance. See generally State ex rel. Pratt v.

Weygant, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (statutes relating to the same subject matter are in *pari materia* and should be read together to ascertain and effectuate legislative intent); Volan v. Keller, 20 Ohio App. 2d 204, 253 N.E.2d 309 (Jefferson County 1969).

When an individual qualifies for re-employment pursuant to R.C. 145.382, the statute provides that he shall be "entitled to a retirement allowance based on his total contributions and service credit accrued during all service as a public employee." (Emphasis added.) Because the retirement allowance is to be based upon total contributions accrued during all public service, it is implicit that, upon re-employment within R.C. 145.382, contributions to PERS are intended to resume. Re-establishment of membership within PERS is a necessary antecedent to the re-calculation of benefits pursuant to R.C. 145.382. Thus, once a retirant becomes re-employed pursuant to R.C. 145.382, the statute, in effect, provides for renewed membership in PERS and there is no provision within R.C. Chapter 145 for members of PERS to receive a retirement allowance. See R.C. 145.41 (membership in PERS ceases upon retirement). This renewed membership within PERS, therefore, causes the cessation of the member's retirement allowance. Cf. R.C. 145.381(B) (a retirant who is re-employed on a temporary basis may continue to receive a retirement allowance but may not re-establish membership in PERS); R.C. 145.381(C) (upon regular re-employment, contributions to PERS resume and the retirement allowance is suspended or forfeited). Receipt of a retirement allowance and contributing PERS membership based on re-employment within R.C. Chapter 145 are mutually exclusive. See R.C. 145.41.

As a function of R.C. 145.382, individuals employed pursuant thereto resume contributions and re-establish membership in PERS. This membership precludes receipt of a retirement allowance during such periods of employment, regardless of the nature of that re-employment. See generally R.C. 145.32; R.C. 145.41. Although this result may seem harsh to individuals employed in less than a full-time capacity, it is a necessary adjunct to the advantages of re-calculated benefits upon re-retirement, and is somewhat ameliorated by the ability of individuals who fall within the terms of R.C. 145.381(B) or (C), as well as R.C. 145.382, to elect temporary or regular re-employment, with the concomitant effects upon retirement benefits, pursuant to either statute.

The foregoing conclusion is supported by reference to the analysis of Am. Sub. H.B. 225, 131st Gen. A. (1965) (eff. Nov. 13, 1965) provided by the Legislative Service Commission to legislators during consideration of the enactment of R.C. 145.382. See R.C. 1.49(C) (if a statute is ambiguous, the court may consider the legislative history); Meeks v. Papadopoulos, 62 Ohio St. 2d 187, 404 N.E.2d 159 (1980) (while not determinative of legislative intent, such analyses are one of the factors which a court may consider when construing a statute). The analysis of Am. Sub. H.B. 225 prepared by the Legislative Service Commission, indicates that the purpose of R.C. 145.382 is to allow "a retirant who is re-employed or elected to a position covered by PERS...to have his original retirement allowance re-calculated on the basis of his original and new public service combined, with the right to select a new payment plan." The analysis further expresses the change which was to be effected by this statute as follows:

Present law provides that a retirant while re-employed may qualify for a new retirement allowance based upon such employment. Upon the second retirement of the member he may receive a new benefit based upon the additional service. He is entitled to two retirement allowances, each independent of the other. This provision would allow certain retirants upon their second retirement to add their additional service to their original service and to have benefits recalculated on the basis of the new and additional service and salary.

Legislative Service Commission analysis of Am. Sub. H.B. 225. It is apparent, therefore, that the legislature's intent in enacting R.C. 145.382 was to provide for the re-calculation of a retirant's original retirement allowance and to permit a retirant to choose a new benefit plan. There is no indication that the legislature intended to vary the general prohibition against an individual who is employed in a

position covered by R.C. Chapter 145 and making contributions to PERS from receiving a retirement allowance pursuant to that chapter.

Thus, R.C. 145.382 enables a retirant who falls within its terms to be re-employed in a position subject to R.C. Chapter 145 and, upon later retirement, to have his retirement benefits re-calculated based upon contributions and service credits accrued during all service as a public employee. Further, such a retirant may elect anew from the benefit options provided under R.C. 145.46. A regularly employed retirant, because of his renewed membership in PERS, may not, however, continue to receive a retirement allowance during the period of regular employment.

It is, therefore, my opinion, and you are hereby advised, that a Public Employees Retirement System retirant who is re-employed pursuant to R.C. 145.382 may not continue to receive a retirement allowance during such re-employment.