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RETIRANT—ELECTED TO PUBLIC OFFICE—LOSS OF PENSION PORTION OF RETIREMENT ALLOWANCE UPON CONDITIONS OF §145.381 R.C., EFFECTIVE SEPTEMBER 15, 1957—6357 OAG 1956, p. 211, Distinguished.

SYLLABUS:

Under the provision of Section 145.381, Revised Code, as amended, effective September 15, 1957, when a former member of the public employees retirement system who is receiving a retirement allowance is elected to a public office of the state or any political subdivision thereof, the pension portion of his retirement allowance is discontinued on the ninetieth day of his continuance in such elective office, or upon his having earned in excess of \$600.00 in such office, whichever is attained first, in such elective position. Opinion No. 6357, Opinions of the Attorney General for 1956, page 211, distinguished.

Columbus, Ohio, August 12, 1958

Hon. Robert O. Stout, Prosecuting Attorney
Marion County, Marion, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

“A duly elected county commissioner now serving, who is retired from receiving benefits under the public employees retirement system from prior county employment, has now been denied those benefits by action of the executive secretary of the public employees retirement system.

“In spite of Attorney General’s Opinion No. 6357, this county commissioner has the ruling of the executive secretary of the retirement system that Revised Code Section 145.381 (Amended September 16th, 1957) changed this situation and the second paragraph of that section suspended allowances of elective officials.

“May I have a ruling concerning whether or not this elected county commissioner is entitled to his retirement allowance during the period he is serving as county commissioner from September 16th, 1957 to the present time.”

At the time the opinion to which you refer was issued, and at the present time, an elected official is not within the purview of the public employees retirement system unless he elects to become such. At the time of the rendi-

tion of that opinion, to-wit, March 12, 1956, Section 145.381, Revised Code, read in material part as follows :

“A former member receiving a retirement allowance, other than a disability allowance, from the system, and hereafter referred to as a superannuate, may be employed * * * provided :

“(A) Such superannuate shall have received a retirement allowance from this system for at least eighteen months ; and

“(B) The employer shall request the public employees retirement board to authorize such employment and shall certify that such superannuate has submitted a report by a medical examiner designated by such employer, that such superannuate is physically and mentally competent to perform the duties to be assigned. Any employer failing to comply with this provision shall pay to this system an amount equal to the pension payments made to such superannuate subsequent to the eighty-ninth work day of such employment ; its equivalent ; or earnings in excess of \$600, whichever is attained first, and during non-compliance thereafter.

Construing said Section 145.381, the then Attorney General in the opinion to which you refer, being No. 6357, Opinions of the Attorney General for 1956, page 213, held :

“2. Where a former member of the public employees retirement system, who is receiving a retirement allowance, is elected to a public office of the state or any political subdivision thereof, the public employees retirement board and the retirement system derive no authority from Section 145.381 or any other section, to terminate the pension portion of the former member’s retirement allowance, upon the former member’s ninetieth day in office as an elective official or upon his earning in excess of \$600, so long as the former member thus elected to public office does not choose to become a new member of the retirement system.”

With that opinion, and the reasoning upon which it was based, I am in full accord. However, by an act of the general assembly, which was passed on May 29, 1957, and became effective September 16, 1957, said Section 145.381 was amended so that the fourth paragraph of the portion above quoted was made to read as follows :

“If such employment by *either an appointive employee or elective official* continues beyond the eighty-ninth work day ; its equivalent ; or earnings in excess of \$600, which is attained first, the pension portions of the retirement allowance shall be terminated on the ninetieth work day ; its equivalent ; or earnings in excess of \$600, whichever is attained first, of such employment, and thereafter shall be forfeited until the first day of the month

after such superannuate ceases to be employed, at which time the retirement allowance shall be resumed. In addition thereto, the board shall pay in one sum the total of all suspended annuity payments. Any option selected as provided by section 145.46 of the Revised Code, shall not be affected by such employment.” (Emphasis added)

It becomes very apparent that the rules upon which the 1956 opinion was based has been radically changed by the insertion in the paragraph last quoted of the words “either an appointive employee or elective official.” The obvious effect of this amendment was to put the elective official in the same situation as was an appointive employee. Since an appointive employee, under the old law and the new as well, who has received a retirement allowance upon superannuation, loses that portion of his retirement allowance which is designated as the “pension portion”, it follows that one whose *employment* is by virtue of *election* suffers the same loss.

Apparently the retirement board in now holding, as indicated by your letter, that a duly elected county commissioner who had retired and was receiving benefits under the public employees retirement system by reason of prior county employment, should now be denied those benefits to the extent provided in the statute, is merely carrying out the plain provisions of the statute, as it now exists.

It will be observed that the employee, *whether appointed or elected*, suffers only the loss of the “pension portion” of the retirement allowance which he had theretofore been receiving.

Section 145.33, Revised Code, which has been in effect since June 29, 1955, provides that upon reaching the status of superannuation, a member shall receive:

“(A) An annuity having a reserve equal to the amount of the member’s accumulated contributions at that time; * * *”

The paragraphs which follow provide for a “pension” made up of several elements which arise from funds supplied by the State.

Accordingly, in specific answer to your inquiry, it is my opinion that under the provision of Section 145.381, Revised Code, as amended, effective September 15, 1957, when a former member of the public employees retirement system who is receiving a retirement allowance, is elected to a public office of the state of any political subdivision thereof, the pension

portion of his retirement allowance is discontinued on the ninetieth day of his continuance in such elective office, or upon his having earned in excess of \$600.00 in such office, whichever is attained first, in such elective position. Opinion No. 6357, Opinions of the Attorney General for 1956, page 211, distinguished.

Respectfully,

WILLIAM SAXBE

Attorney General