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1. RETIREMENT SYSTEM, PUBLIC EMPLOYEES—ELECTIVE OFFICIAL NOT REQUIRED BY LAW TO BECOME MEMBER—MAY BECOME MEMBER—SECTION 145.20 RC.
2. FORMER MEMBER OF SYSTEM, RECEIVING RETIREMENT ALLOWANCE IS ELECTED TO PUBLIC OFFICE—NO AUTHORITY UNDER SECTION 145.381 RC FOR BOARD AND SYSTEM TO TERMINATE PENSION PORTION OF FORMER MEMBER'S RETIREMENT ALLOWANCE—UPON MEMBER'S NINETIETH DAY IN OFFICE—EARNINGS IN EXCESS OF \$600.00—FORMER MEMBER DOES NOT CHOOSE TO BECOME NEW MEMBER OF SYSTEM.
3. PROVISION IN SECTION 145.381 RC THAT PUBLIC EMPLOYEES BOARD MAY MAKE RULES AND REGULATIONS AND PREVENT ABUSE OF RIGHTS—DOES NOT AUTHORIZE RETIREMENT BOARD TO MAKE RULES AND REGULATIONS INCONSISTENT WITH STATUTE.

SYLLABUS:

1. An elective official of the state or of any political subdivision thereof having employees in the public employees retirement system is not required by law to become a member of the public employees retirement system, but an elective official may become a member of the system pursuant to Section 145.20, Revised Code.

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.

3. The provision contained in Section 145.381, Revised Code, to the effect that the public employees retirement board may make rules and regulations to carry the provisions of that section into effect and to prevent abuse of the rights therein granted, does not purport to authorize the retirement board to make rules and regulations which are inconsistent with the provisions of Section 145.381, Revised Code.

Columbus, Ohio, March 12, 1956

Hon. Fred L. Schneider, Executive Secretary
Public Employees Retirement System
Columbus, Ohio

Dear Sir:

I have your request for my opinion, which in the interest of brevity, as well as for the purpose of pin-pointing the question, I have undertaken to paraphrase as follows:

A person who recently was a member of the Public Employees Retirement System, and who retired and is now drawing a monthly retirement allowance, has been elected to the office of justice of the peace, for which office the salary of \$250.00 per month has been set by the county commissioners. It is asked whether the pension portion of the monthly allowance now being paid to this person should be suspended upon "the eighty-ninth work day; its equivalent; or earnings in excess of \$600.00, whichever is attained first?"

Your request revolves around an interpretation of Section 145.381, Revised Code, and you state that the retirement board has a "policy" which is to the effect that the last paragraph of this section authorizes the board to treat a retired person who becomes an *elective* official in the same manner as one who is *re-appointed* or *re-employed* by a governmental unit, so as to effect a suspension of that person's pension upon the occurrence of any of the contingencies relative to re-employment, referred to above.

Section 145.381, Revised Code, reads 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.

*“If such employment continues beyond the eighty-ninth work day, it equivalent; or earnings in excess of \$600, whichever 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. * * **

*“When such superannuate is employed for a period longer than eighty-nine work days he shall become a new member of the public employees retirement system, except as otherwise provided in section 145.03 of the Revised Code, and shall have all the rights and privileges and be charged with all obligations of membership. * * **

“The public employees retirement board may make rules and regulations to carry the provisions of this section into effect and to prevent abuse of the rights granted.” (Emphasis added.)

If a retired former member in the retirement system is elected to a public office, does the foregoing statute dictate that his pension shall be terminated on the ninetieth work day or upon earning in excess of \$600.00? Or, if it is not clear from the statute itself that the pension of the elective official is to be suspended upon the conditions therein recited, is the retirement board empowered to rule that retired former members who become elective officials shall be treated in the same manner as retired former members who are appointed to a position of public employment?

Before attempting to arrive at the legislative intent underlying Section 145.381, *supra*, it would seem advisable first to examine briefly the status of an elective official under the retirement law, without regard to the question of “reemployment” of a retired former member.

It will be noted that Section 145.01 (A), Revised Code, part of the definition section, provides in part:

*“‘Public employee’ means any person holding an office, not elective, under the state or any county, municipal corporation * * * or employed and paid in whole or in part by the state or any of the authorities named in this division * * *.” (Emphasis added.)*

Hence, in the very first sentence of the retirement law it is made clear that an elective official is not a "public employee."

Next, I direct your attention to Section 145.03, Revised Code, which provides in material part as follows:

"A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in section 145.01 of the Revised Code. *Membership in the system shall be compulsory and shall consist of all public employes upon being appointed. * * **" (Emphasis added.)

This statute provides for compulsory membership in the system "upon being appointed."

The third step is to observe the provision in Section 145.20, Revised Code, which *permits* an elective official to become a member of the retirement system, if he so chooses. While the retirement system first went into operation on January 1, 1935, the provision concerning elective officials became effective on August 1, 1941. See 119 Ohio Laws, 150 (151).

Section 145.20, Revised Code, provides in part:

"*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 other obligations of membership. * * *" (Emphasis added.)

Having set forth the statutes relative to the status of elective officials, I shall return to Section 145.381, *supra*. That section, dealing with the employment of a superannuate, commences with the words:

"A *former member* receiving a retirement allowance * * * may be employed * * * provided: * * *" (Emphasis added.)

A person on retirement and receiving a retirement allowance is a *former member*. The person in question had been in public employment in some capacity and retired. Section 145.41, Revised Code, makes it abundantly clear that membership in the retirement system ceases upon refund of accumulated contributions or *upon retirement*.

Therefore, when the person in question made application for retirement and went on retirement, he ceased to be a "member" of the system.

Section 145.381 allows employment of a superannuate upon certain conditions, and then, in turn, it provides for the suspension by the retirement system of pension portion of the superannuate's allowance upon the ninetieth work day, or earnings in excess of \$600.00. The section clearly is not directed at *private* employment of the superannuate, but rather at *public* employment within the meaning of the retirement act.

Section 145.381 further provides as follows:

"* * * When such superannuate is employed for a period longer than eighty-nine work days *he shall become a new member* of the public employees retirement system * * *."

When all of the foregoing considerations are taken into account, the conclusion is inescapable that Section 145.381, Revised Code, does not require or permit suspension of the pension of a superannuate who is *elected* to public office.

An elective official is not a member of the system unless he chooses to be. The sentence quoted above relative to a superannuate becoming "a new member" of the retirement system upon employment for a period longer than eighty-nine work days, was intended to apply to public employment for which the retirement law makes membership in the system compulsory. In other words, Section 145.381, *supra*, was directed at that form of employment, which, but for the provision about eighty-nine days, would otherwise render the employed superannuate amenable to membership in the system immediately upon his becoming employed. An elective official cannot be compelled to become a member of the retirement system.

It is also a bit difficult to view a superannuate who becomes elected to public office as one who has become "employed." The statute is obviously directed at a situation where a public employer consciously employs a superannuate (i.e., a former member of the retirement system). No one really employed the elective official. The *electors* elected him.

Furthermore, paragraph (B) of the statute provides that the employer shall request the retirement board to "authorize such employment" and requires the employer to certify that the superannuate has submitted a report by a medical examiner designated by the employer, that such superannuate is physically and mentally competent "to perform the duties to be assigned."

Obviously, that requirement does not fit the case of an elective official. Who is the person "authorizing such employment" and who is the person who will certify that the elective official, be he governor, county commissioner, state representative, or justice of the peace, has submitted a medical report that the elective official is physically and mentally competent "to perform the duties to be assigned?" The duties of an elective official are assigned by law.

For the purpose of this section, it appears that a superannuate who becomes an elective official is in no different position than a superannuate who enters purely private employment. The retirement board clearly cannot suspend the pension of a superannuate in the latter category, and it is my opinion that it cannot suspend the pension of a superannuate who becomes an elected official, where that person does not choose to become a "new member" of the system. Both cases involve employment which is not amenable to the retirement law.

The statement is made in your letter that the retirement system "policy" is grounded upon the last paragraph of Section 145.381, Revised Code. That paragraph provides :

"The public employees retirement board may make rules and regulations *to carry the provisions of this section into effect* and to prevent abuse of the rights granted." (Emphasis added.)

Manifestly, the retirement board or the management of the system cannot make rules and regulations which are *inconsistent* with the law which those rules and regulations are supposed to implement. An elective official cannot be *made* a new member of the system nor can his pension be suspended if the law does not so provide.

In my opinion the last paragraph of Section 145.381 is designed to enable the retirement board to elaborate upon how reports shall be made to the system in order to insure that employers are not evading requirements of the law.

In passing, I note that the particular individual in question is also employed as a postal inspector. That fact has no bearing upon my opinion, for the reason that any federal statute or regulation limiting such multiple employment would clearly affect only an individual's status as such *federal* employee.

Accordingly, it is my opinion that :

1. An elective official of the state or of any political subdivision thereof having employees in the public employees retirement system is *not required* by law to become a member of the public employees retirement system, but an elective official may become a member of the system pursuant to Section 145.20, Revised Code.

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.

3. The provision contained in Section 145.381, Revised Code, to the effect that the public employees retirement board may make rules and regulations to carry the provisions of that section into effect and to prevent abuse of the rights therein granted, does not purport to authorize the retirement board to make rules and regulations which are inconsistent with the provisions of Section 145.381, Revised Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General