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ELECTIVE OFFICE—DETERMINATION—“FULL TIME” SALARIED OFFICE WITHIN MEANING OF SECTION 486-59 G. C.—WITHIN SOUND DISCRETION OF PUBLIC EMPLOYES RETIREMENT BOARD—MAYOR OF MUNICIPALITY—ELIGIBILITY TO RECEIVE RETIREMENT ALLOWANCE.

SYLLABUS:

The determination whether an elective office is a “full time” salaried office within the meaning of Section 486-59, General Code, is a matter to be determined from all the facts by the Public Employees Retirement Board in the exercise of its sound discretion.

Columbus, Ohio, June 10, 1948

Mr. Fred L. Schneider, Secretary, Public Employes Retirement System  
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“The Retirement Board has instructed its Secretary to request an opinion from your office, indicating whether a retired member of the System who is later elected mayor of a municipality, at an annual salary of \$1800 per year is eligible to continue to receive his retirement allowance, during the period that he accepts a salary for services rendered as mayor of the municipality.

“In this connection it might be well to state that at its regular monthly meeting on May 20, the Retirement Board held that the position was a part time function.”

Section 486-59, General Code, which provides for retirement of members of the system after reaching the age of sixty years, provides in part as follows:

“In the event any retired pensioner, after such retirement, is elected to a *full-time* salaried office by the electors of the state or any political subdivision thereof at any election, such pensioner, by the acceptance of any such office shall forfeit his pension during the period such pensioner so holds such office and receives the salary therefor.” (Emphasis added.)

In an opinion by my immediate predecessor, found in 1942 Opinions of the Attorney General, page 441, there was under consideration the meaning of the word “years” as used in those sections of the public employes retirement law relating to the prior service pension. The statute at that time allowed a retiring member a prior service pension “equal to one and one-third percentum of his average prior service salary multiplied by the number of years of service in his prior service certificate.” The question before the Attorney General was, what credit should be given for a period of prior service when the nature of his employment was such that in all probability it required only a very small portion of his time, such as the duties incident to the position of a township trustee or

member of council or clerk of a village. It was held, as shown by the syllabus, as follows:

“It is the duty of the Public Employes Retirement Board to allow a member of the Public Employes Retirement System credit for a full year of prior service for each year that such member served in any position or office for which prior service may be legally credited, if such member was employed in the position on an annual basis or if he was appointed to such position or elected to such office for a year or years and his salary fixed accordingly, regardless of the amount of such salary and regardless of the fact that the service rendered may not have required the full time of such employe or officer. There is no authority in such board to adopt and apply any rule or regulation providing otherwise.”

In the course of the opinion it was stated that even though the board might be convinced that officers or employes such as those mentioned put in a very small portion of their time in the performance of their official duties, yet since they were elected for a term of years and on an annual salary, there was no justification for saying as a matter of law that they were not on duty at all times. It was therefore held that a full year of prior service was to be credited for each calendar year regardless of the nature of the duties or the probability that the member devoted substantially all of his time to some other occupation and that his official time was merely incidental. That opinion was doubtless sound as the law then stood. The General Assembly, however, shortly thereafter amended Section 486-33b, General Code, relating to prior service, by providing that if the retirement board should determine that a position in any calendar year was a part time position the board should have authority to determine what fractional part of a year's credit should be given.

Here was a legislative recognition that as to the period of prior service an employe might be considered as only a part time officer or employe even though he is elected or appointed for a term of years and receives compensation on a yearly basis.

In an opinion which I rendered to your board on March 1, 1947, being No. 1655, I held that the office of township trustee is not a full time salaried office within the provision of Section 486-59 supra. In the course of that opinion it was pointed out that the statute gives no definition of

“full time salaried office” and that accordingly, we are justified in determining the question as to a given office on the basis of the facts ascertainable. It was there pointed out that it is quite obvious that the clerk or member of council in a small village, a township trustee or clerk in the average township, can hardly be said to be a full time officer, although he is elected for a term of two years.

Section 486-59, which we are considering, distinctly recognizes that a person may be elected to a salaried office which is only a part time office. The very use of the words “full time” is conclusive that the General Assembly regarded some elective offices as not *full time* and, therefore, as only *part time* offices.

Accordingly, it becomes a matter for the retirement board, in the exercise of a sound discretion, to determine whether in a given case an office is a full time or a part time office within the purview of Section 486-59. It occurs to me that so many uncertainties enter into this determination that it may be impossible to lay down any general rule which would cover all cases. For instance, the duties devolving upon the mayor of a city of any size might depend very largely on the form of government under which the city is operated. If under the regular municipal code, the mayor would have certain duties prescribed by statute which would obviously require a considerable part of his time and attention and for which he might receive very substantial compensation. If on the contrary the same city were operated under a city manager form of government, the mayor might be reduced to a position that was largely ornamental and ceremonial and might have very limited duties to perform. In some cases he might and in other cases he might not be charged with the duties of a police justice.

Whether or not the mayor of the city mentioned in your letter who receives \$1800 per annum is under all the circumstances a full time officer, is a matter which cannot be answered as a matter of law. In my opinion it is a question of fact which must be determined by your board, based upon information not only as to the salary but as to the nature of his duties. In reaching this determination, the size of the city, the character of the governmental organization, and the compensation paid might be taken into consideration.

In arriving at a determination whether an office is a "full time" office, it would not be proper to give that term an extreme or unreasonable interpretation. Probably a large portion of the elected officers of the counties and cities are able to devote a considerable portion of their time to private affairs and yet might be regarded as full time officers. The situation calls for the exercise of sound reason and good sense in reaching a conclusion.

A general rule might be formulated, based upon the above considerations, that would apply to cities operating under the regular form of government prescribed by the municipal code. To a certain extent, other general conditions might be the subject of further rules. There might still remain individual cases which would have to be determined by the board, based upon specific information applicable to the special case.

In specific answer to your question it is my opinion that the determination whether an elective office is a "full time" salaried office within the meaning of Section 486-59, General Code, is a matter to be determined from all the facts by the Public Employes Retirement Board, in the exercise of its sound discretion.

Respectfully,

HUGH S. JENKINS,  
Attorney General.