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Opinion No. 12-43

City Councilmember's Receipt of TCRS Benefits While Holding Office

QUESTIONS

1. Can a city councilmember who participates in the Tennessee Consolidated Retirement System (TCRS) as a result of that position as well as his employment by the State retire from his State employment position, receive TCRS benefits, and continue to hold his elected office as city councilmember?

2. Can this councilmember remain on the city council and still receive retirement payments from TCRS?

3. Can this councilmember now elect to "opt out" of TCRS participation as a member of the city council in order to receive benefits from TCRS for his retirement from his State employment position?

4. Can this councilmember decline or otherwise refuse to collect his salary for his elected position and remain on the city council while continuing to receive TCRS benefits?

5. After retiring from State service, can this councilmember be a candidate for election and if elected be eligible to continue receiving retirement benefits from TCRS?

OPINIONS

1. No, the city councilmember cannot receive TCRS benefits while continuing to hold a position on the city council, through which he participates in TCRS.

2. No, the city councilmember cannot remain in a position in which he participates in TCRS and at the same time receive retirement payments from TCRS.

3. No, the city councilmember cannot now elect to "opt out" of TCRS. Once a city councilmember elects to participate in TCRS, that election is irrevocable. See Tenn. Code Ann. § 8-35-123.

4. No, the city councilmember cannot decline or otherwise refuse to collect his salary for his elected position. The rule in Tennessee is that if a public official is entitled to a specified compensation by law, this compensation may not be refused.

5. No, if the city councilmember is re-elected to the city council, he will be ineligible to receive TCRS benefits because his benefits are based on service and salary rendered as a city councilmember as well as service and salary rendered as a State employee. *See* Tenn. Code Ann. § 8-36-818.

ANALYSIS

1. The requestor has provided the following background information in relation to the questions posed. Under the city of Dickson's private act charter, section 2.01(e) and Tenn. Code Ann. § 8-35-226, Dickson city councilmembers participate in TCRS. City councilmembers are paid a percentage (17.5%) of the county mayor's salary pursuant to the city charter. A city councilmember is retiring from a State employment position in which he also participates in TCRS. The State employment position from which he is retiring is not a position as a State police officer or a State wildlife officer.

The provisions controlling the receipt of TCRS benefits are currently codified at Tenn. Code Ann. §§ 8-36-101 to -823. Termination of employment is a condition precedent to the receipt of TCRS benefits. Tenn. Code Ann. § 8-36-203 provides that "[a]ny member eligible to retire may set the effective date of the member's retirement at any date within one hundred fifty (150) days before or after the date that the member's application is filed with the board; *provided, that such effective date of retirement follows the date of the member's separation from service.*" (emphasis added). Generally, an individual is prohibited from being a contributing member of TCRS and receiving benefits from TCRS at the same time. Tenn. Code Ann. § 8-36-804 provides that "[n]o member shall be entitled to establish retirement credit for any period during which the member received a retirement allowance." Retired members of TCRS who return to work in a position covered by TCRS cannot receive TCRS benefits during the period of re-employment, unless an exception applies. Tenn. Code Ann. § 8-36-801(a) provides as follows:

> Except as provided in this part, any retired member of the Tennessee consolidated retirement system, or of any superseded system, or of any local retirement fund established pursuant to chapter 35, part 3 of this title who accepts employment in a position covered by the Tennessee consolidated retirement system shall, as a condition of such employment, cease to draw the member's retirement allowance during the period of the employment.

Tenn. Code Ann. § 8-36-818 currently contains an exception that applies to retired State employees who return to work as a city councilmember after retiring from State service. That statute provides as follows:

> Any retired member of the Tennessee consolidated retirement system or of any superseded system administered by the state of Tennessee may accept employment in a position covered under § 8-35-226(a) without loss or suspension of retirement benefits; provided, that:

> (1) Such retirement benefits are based on service and salary rendered in a position other than a position covered under § 8-35-226(a); and
>
> (2) The retired member shall not be eligible to accrue additional retirement benefits as a result of such employment.

Tenn. Code Ann. § 8-36-818.

In the instant situation, the individual described seeks to retire from a State employment position, receive TCRS benefits, and continue to hold elected office as a city councilmember. The statutes governing TCRS do not permit this individual to receive TCRS benefits while continuing to serve on the city council, given that he participates in TCRS as a result of his employment on the city council. The individual described plans to terminate his employment with the State, but he plans to continue to hold his position on the city council in which he also participates in TCRS. Members of TCRS cannot receive TCRS benefits while simultaneously accruing additional TCRS benefits as a result of employment in a position that is covered by TCRS. Because the individual described participates in TCRS as a result of his employment on the city council, he cannot receive TCRS benefits while continuing to hold that position.

The provisions regarding reemployment after retirement support this conclusion. Under Tenn. Code Ann. § 8-36-801(a), a retired member of TCRS who accepts employment in a position covered by TCRS "shall, as a condition of such employment, cease to draw the member's retirement allowance during the period of the employment." Under Tenn. Code Ann. § 8-36-818, a retired member of TCRS can serve as a city councilmember without a loss or suspension of retirement benefits, provided that his or her retirement benefits are based on service and salary rendered in a position other than a position covered under Tenn. Code Ann. § 8-35-226(a). The individual described cannot return to work as a city councilmember after retirement without a suspension of benefits because his benefits are based on his service and salary as a city councilmember (a position covered under Tenn. Code Ann. § 8-35-226(a)) as well as his service and salary as a State employee. To qualify for the exception under Tenn. Code Ann. § 8-36-818, a retired member of TCRS must have earned his retirement benefits solely as a result of State service.

This conclusion is consistent with prior opinions in which this Office has been asked to interpret the provisions of TCRS in situations where an employee either retires from State service or wishes to retire from State service but then at some point seeks to re-enter or continue in a position covered by TCRS. Previously, this Office addressed whether a general sessions judge may refuse the compensation established by law for that office and begin drawing retirement benefits instead. We concluded that if the judge attempted to waive his salary, that attempt would violate Art. VI, § 7 of the Tennessee Constitution, which provides that judges "shall . . . receive a compensation for their services." Op. Tenn. Att'y Gen. 89-51, at 3 (Apr. 10, 1989). We also determined that Tenn. Code Ann. §§ 8-36-203 and -801(a) prohibited the judge from retaining his position without pay in order to receive retirement benefits. We explained that "termination of employment is a condition precedent to the receipt of retirement benefit";

therefore, "a member of the retirement system may not continue in his employment and retire at the same time." *Id.* at 4.

This Office has also previously addressed the effect of Tenn. Code Ann. § 8-36-801 in determining whether a person elected to county office as a circuit court clerk could serve in that capacity and still receive benefits as a retired Group 2[1] member of TCRS. We explained that "[t]wo issues must be addressed by any retiree wishing to continue receiving his or her benefits during reemployment: first, whether the new position is „œcovered by the TCRS' and, second, whether there is an exception that applies to that person." Op. Tenn. Att'y Gen. 05-187, at 1 (Dec. 28, 2005). We concluded that a retired State police officer or State wildlife officer could serve as a circuit court clerk and continue to receive retirement benefits from TCRS under an exception contained in a prior version of Tenn. Code Ann. § 8-36-809 that was repealed by 2005 Tenn. Pub. Acts 203, § 6. *Id.* at 2-3. The individual described in the instant question is not a retired State police officer or State wildlife officer, and no other exception applies.

2. The analysis of question 1, above, is determinative of question 2 as well. The city councilmember cannot receive benefits from TRCS while retaining his position on the city council in which he contributes to TCRS.

3. Tenn. Code Ann. § 8-35-123 provides that "[f]or any person participating in the Tennessee consolidated retirement system pursuant to §§ 8-35-101, 8-35-103, 8-35-115, 8-35-116, 8-35-122, *and 8-35-226*, or as a state judge, county judge, county official, commissioner, county chair or attorney general whose membership in the retirement system is optional, and who thereafter elects to become a member, *such election is irrevocable.*" (emphasis added). The city councilmember in question participates in TCRS pursuant to Tenn. Code Ann. § 8-35-226, which provides that elected members of a city council "shall be eligible for membership in the Tennessee consolidated retirement system at the option of the chief legislative body of the city." Tenn. Code Ann. § 8-35-226(a). Once the election to participate in TCRS has been made, that election is irrevocable under Tenn. Code Ann. § 8-35-123. Accordingly, the city councilmember cannot "opt out" of TCRS in order to receive TCRS benefits while retaining his position on the city council.

4. The general rule in Tennessee is that when the compensation of a public official is established by law, he or she cannot accept a lesser amount. *See Carmichael v. Hamby*, 217 S.W.2d 934, 938 (Tenn. 1948) (agreeing to a lower salary than authorized may be seen as a form of bribery of the electorate); *Carter v. Jett*, 370 S.W.2d 576, 582 (Tenn. Ct. App. 1963) (where compensation of public official is established by law, he cannot accept less); Op. Tenn. Att'y Gen. 04-15 (Feb. 5, 2004); Op. Tenn. Att'y Gen. 89-51 (Apr. 10, 1989). Therefore, the city councilmember cannot refuse the compensation established by law for that position in order to receive TCRS benefits while retaining his position on the city council.

5. Tenn. Code Ann. § 8-36-801(a) provides that retired members of TCRS shall cease receiving retirement benefits during a subsequent period of employment in a position that is

[1] Group 2 includes "State police officers, wildlife officers, game and fish officers so classified prior to April 1, 1974, firefighters and police officers." Tenn. Code Ann. § 8-35-105(2).

covered by TCRS, unless an exception applies. Tenn. Code Ann. § 8-36-818 provides an exception for retired members of TCRS who later accept employment in a position covered under Tenn. Code Ann. § 8-35-226(a), provided that their retirement benefits are not based on service and salary rendered in a position covered under § 8-35-226(a). The city councilmember's retirement benefits are based in part on service and salary rendered as a city councilmember, which is a position covered under Tenn. Code Ann. § 8-35-226(a). Therefore, if he is reelected to the city council, he will be ineligible for the exception provided by Tenn. Code Ann. § 8-36-818, and his retirement benefits will be suspended during any period of re-employment on the city council.

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