

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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December 28, 2005

Opinion No. 05-187

Ability of T.C.R.S. Group 2 Retirees to Continue Drawing Benefits While Serving as Circuit Court Clerk

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**QUESTION**

May a person elected to county office as circuit court clerk serve in that capacity and still draw benefits as a retired Group 2 member of the Tennessee Consolidated Retirement System (“T.C.R.S.”)?

**OPINION**

Under current law, such a person’s ability to continue drawing benefits from T.C.R.S. while serving as circuit court clerk and participating in T.C.R.S. will depend upon the specific Group 2 position from which that individual retired. If that position was as a state police or state wildlife officer, then the person could continue to draw benefits from T.C.R.S. while serving as clerk.

**ANALYSIS**

The general law governing T.C.R.S. benefits of retirees who return to work is found at Tenn. Code Ann. § 8-36-801, which was amended effective July 1, 2005. This statute now states that

Except as required in this part, any retired member of the [T.C.R.S.], or of any superseded system, or of any local retirement fund established pursuant to chapter 35, Part 3 of this title who accepts employment in a position covered by the [T.C.R.S.] shall, as a condition of such employment, cease to draw the member’s retirement allowance during the period of the employment.

Two issues must be addressed by any retiree wishing to continue receiving his or her benefits during reemployment: first, whether the new position is “covered by the T.C.R.S.” and, second, whether there is an exception that applies to that person.

Under Tenn. Code Ann. § 8-35-116(b), county judges and officials (which group by definition in Tenn. Code Ann. § 8-34-101 includes circuit court clerks) in office or taking office after

June 30, 1981, may become members of T.C.R.S., but that option is not open to those “officials in counties which provide a county retirement system in which such officials may participate, without a resolution by the county legislative body allowing such election and the approval of the state retirement division.” However, “any person who has obtained vesting in the [T.C.R.S.] and who is elected or appointed as a county judge, executive or county official in such counties which provides (sic) a county retirement system . . . shall have the right of electing in writing to continue participation in the [T.C.R.S.]” Tenn. Code Ann. § 8-35-116(b). Even if eligible, no county official is required to become a member of T.C.R.S. and must actively elect to do so. Tenn. Code Ann. § 8-35-109.

Because the individual posited in the instant request is a “retired Group 2 member of the T.C.R.S.,” we may assume that he or she “has obtained vesting in the [T.C.R.S.]” and is therefore permitted, if he or she so elects, to participate in the system regardless of the presence in his or her county of an available county retirement system or the approval of the county legislative body and the State retirement division. Under these facts, then, the posited circuit court clerk occupies — by virtue of his election to continue as a member of T.C.R.S. — a “position covered by the [T.C.R.S.]” under Tenn. Code Ann. § 8-36-801, and the clerk’s benefits must be suspended while in office, barring the existence of an applicable exception to § 8-36-801. Group 2 includes “[s]tate 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.

Provisions specifically allowing certain members to continue drawing benefits while they are reemployed may be found throughout part 8 of title 8, chapter 36, the most potentially relevant to this situation being Tenn. Code Ann. §§ 8-36-805, -809, and -819.<sup>1</sup> Section 8-36-805 permits continuing receipt of benefits during reemployment if that service meets several criteria, such as working fewer than 120 days per twelve months, receiving no more than sixty percent of the retiree’s annual full-time salary in the year before he or she retired, and not returning to service until at least 60 days after the first retirement. Because the duties of a circuit court clerk do not seem compatible with the 120-day requirement, this opinion will not consider the possibilities of § 805 at any greater length. Section 8-36-809 permits “a retired state general employee, state police officer, or state wildlife officer” to accept employment with a political subdivision without having his or her benefits discontinued. Section 8-36-819 allows “any retired Group 2 member who elected to come under the provisions of § 8-36-201(b)(2)(A) and whose Group 2 service was rendered to a political subdivision [to] accept employment with the state of Tennessee without loss or suspension of retirement benefits” where the certification of the relevant department head and the authorization of the continuance of benefits are in place. Both sections 809 and 819 are “[n]otwithstanding any provision of this part to the contrary.”<sup>2</sup>

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<sup>1</sup> The other sections are facially inapplicable, including Tenn. Code Ann. § 8-36-818, which requires acceptance of a position covered by Tenn. Code Ann. § 8-35-226(a), which does not include circuit court clerks.

<sup>2</sup> Section 819 states “of law” in the place of the phrase “of this part.”

The applicability of Tenn. Code Ann. § 8-36-819 may be disposed of first. The critical language of that statute for these purposes is the requirement that the new employment be “with the state of Tennessee.” A circuit court clerk is employed by his or her particular political subdivision. The provisions for compensation for such an official are found in chapter 24 of title 8 of the Tennessee Code, under “Compensation for County Officers and Clerks of Court,” as opposed to chapter 23 of the same title, “Compensation of State Officers and Employees.” Clerks of circuit courts then (specifically included in chapter 24 by Tenn. Code Ann. § 8-24-102(a)) are not State employees, and must therefore be considered employees of their counties. This is consistent with Tenn. Code Ann. § 8-35-116, which permits circuit court clerks (as part of the group “county officials”) to participate in T.C.R.S. only if either their political subdivision has elected to participate (subsection (a)(1)) or their participation is approved by both the county legislative body and the state retirement division (subsection (b)(1)(A)). Under either method, the county bears the employer cost of T.C.R.S. participation, not the State. A circuit court clerk is therefore an employee of a political subdivision and not qualified for the exception found at Tenn. Code Ann. § 8-36-819.

This leaves Tenn. Code Ann. § 8-36-809 as the only possibility for a circuit court clerk with the background posited in this opinion to continue drawing retirement benefits from T.C.R.S. while serving as clerk. As noted above, that section permits “a retired state general employee, state police officer, or state wildlife officer” to accept employment with a political subdivision and continue drawing benefits. One prong of that requirement — that the new employment be with a political subdivision — is satisfied by the analysis above concluding that circuit court clerks are employees of their particular county. As to the other prong, there are two positions common to both Group 2 and § 8-36-809: State police officers and State wildlife officers. Therefore, under the law currently in effect, a retired State police officer or State wildlife officer may serve as circuit court clerk and continue drawing retirement benefits from T.C.R.S. under Tenn. Code Ann. § 8-36-809,<sup>3</sup> although retirees from other positions may not.

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<sup>3</sup> Note that Tenn. Code Ann. § 8-36-809 is repealed effective January 1, 2006, pursuant to 2005 Tenn. Pub. Acts 203 § 6. This act may affect the answer to this question with respect to certain retired state police and wildlife officers, depending upon the specific facts and circumstances of each case.

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Requested by:

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