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George V. Crum
Administrative Assistant
Public Employees Retirement System
Building 5, Room 1052
Capitol Complex
Charleston, West Virginia 25305

Dear Mr. Crum:

This office is in receipt of your request for an opinion concerning when an elected official must resign his office in order to qualify for the early retirement incentive options. You have also requested our opinion in a related matter; that being whether an elected official is eligible for benefits under the early retirement law if he retires and thereafter serves in an elective office.

In response to your first inquiry, the answer depends upon the elected official's eligibility date. W.Va. Code 5-10-22c(a) as enacted by the Legislature in Enrolled Committee Substitute for Senate Bill No. 10 states as follows:

"(a) Beginning on the first day of April, one thousand nine hundred eighty-eight, and continuing through the thirty-first day of December, one thousand nine hundred eighty-eight, (or as extended by eligibility qualification requirement, as hereinafter specified) eligible members, being those active, contributing members actually and currently employed on such beginning date, retiring pursuant to this section, and from any state, county or municipal position, covered under the two divisions of this retirement system (the state division and the public employer, nonstate division) including those so employed on said beginning date and leaving the system during the incentive period and who are eligible for taking deferred retirement (but not disability retirees) may elect to participate in this incentives program and may elect any one of the three following incentive options:

. . . .

Active, contributing members who desire to retire under this section but who are unable to retire by the thirty-first day of December, one thousand nine hundred eighty-eight and make use of the incentive retirement program because an element of eligibility for retirement, such as age or other element, will not be met until a date after the thirty-first day of December, one thousand nine hundred eighty-eight and before the first day of July, one thousand nine hundred eighty-nine, shall be permitted to postpone actual retirement until the date of fulfilling such element of eligibility and shall retire on such date, before the temporary retirement incentive program ends on the thirtieth day of June, one thousand nine hundred eighty-nine; with proper credit to be granted for such extended period: Provided, That they shall have made application for retirement, including choice of their respective option, and given notice to their respective employer by the thirty-first day of December, one thousand nine hundred eighty-eight, although postponing actual retirement, as aforesaid." (emphasis supplied)

In short this Code provision requires all members who are eligible to retire from April 1, 1988, through December 31, 1988, to retire by that latter date in order to qualify for the incentive options outlined in Code 5-10-22c. The only exception is for those members who become eligible after December 31, 1988, but prior to July 1, 1989. These members may postpone retirement until their eligibility date. However, these members must apply for retirement, choose their option and give notice to their employers by December 31, 1988.

The language in Code 5-10-22c is clear and unequivocal. If an elected official is eligible to retire by December 31, 1988, he must retire by that date in order to receive the enhanced benefits contained in the early retirement law. If the elected official's eligibility date falls after December 31, 1988, but prior to July 1, 1989, he must retire on his eligibility date. Furthermore, he must make application therefore by December 31, 1988, to qualify for any early retirement incentives. The law does not distinguish between elected officials and any other members in regard to eligibility dates and dates of retirement.

Your second area of inquiry is whether an elected official may retire under the early retirement law and thereafter serve in an elected office.

Code 5-10-22c(b) provides that a person, elected official or otherwise, may retire under the early incentives program and thereafter serve in an elective office. However, he forfeits his ability to increase his pension by use of the early retirement incentives during and after his term of office.

Specifically Code 5-10-22c(b) states:

"(b) Any member participating in this retirement incentive program is not eligible to accept further employment from the state or any of its political subdivisions: Provided, That a person may retire under this section and thereafter serve in an elective office: Provided, however, that he shall not receive an incentive annuity under this section during the term of service in said office, but shall receive his or her annuity calculated on regular basis, as if originally taken not under this section but on such regular basis. At the end of such term and cessation of service in such office during which the member shall rejoin and reenter the retirement system and pay contributions therefor, such regular annuity shall be recalculated and an increased annuity due to such additional employment shall be granted and computed on regular basis and in similar manner as under section forty-eight of this article. . ." (emphasis supplied)

Practically speaking a person eligible to retire under the early incentives program has two choices. One is to retire under the program and to receive currently and in the future the increased benefits inherent in said program. The second is to serve in an elective office and receive a pension calculated on a regular (pre Senate Bill 10) basis.

Code 5-10-22c(b) permits an elected official or any other person to retire under this program and at a later date return to service in an elected office. However, if a retirant serves in an elected office, his pension is calculated on a regular basis, during and after his term of office. The elected official contributes to PERS during his term and is entitled to a recalculation of his benefits after his term of office. However, the recalculation is for the purpose of adding the additional years of service. The computation continues to be made on a regular, pre-early retirement incentives program, basis.

Finally, there has been some controversy surrounding the following factual situation: An elected official is eligible for early retirement prior to December 31, 1988. Said official has

been elected to a new term of office which begins in January, 1989. May that official resign his office prior to December 31, 1988, take early retirement with its increased benefits, and then return to office in January 1989?

Clearly the official may take office in 1989, however as stated above, he forfeits any increased annuity for which he would be eligible under the incentives program during and after his term of office. The question which concerns this office is whether the retirant may resign his office for the purpose of receiving increased benefits prior to serving his new term.

The Legislature could not have contemplated such a bizarre situation and therefore did not specifically address this issue. However, we must assume that elected officials would want to serve the interests of their constituents and therefore complete the term of office to which they were elected. To resign from office for a matter of weeks or a few months and then return to office for the sole purpose of increasing one's retirement benefits violates public policy and totally frustrates the purpose of the early retirement law. The stated purpose of said law is contained in Code 5-10-22c and reads as follows:

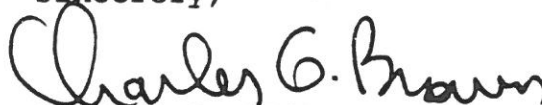
"The Legislature hereby finds and declares that a compelling state interest exists in providing a temporary early retirement incentives program for encouraging the early, voluntary retirement of . . . public employees . . ., in the reduction of the number of such employees and in reduction of governmental costs therefor . . ."

In conclusion it is the opinion of this office that:

- 1) Elected officials are subject to the same eligibility dates regarding early retirement as any other member;
- 2) One may retire under the early incentives program and later serve in an elective office, however one forfeits his ability to increase his pension by use of the early retirement incentives during and after his term of office; and

3) To resign from an elected office for a short period of time and then return to office for the purpose of increasing one's retirement benefits violates public policy and frustrates the purpose of the retirement law.

Sincerely,



CHARLES G. BROWN
ATTORNEY GENERAL

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