



Lynn Fitch
ATTORNEY GENERAL
OPINIONS

May 19, 2020

The Honorable John M. Caldwell, Sr.
Commissioner of Transportation
Northern District, Mississippi
1909 North Gloster Street
Tupelo, Mississippi 38803

Re: PERS Retirees Holding Elective Office of Transportation Commissioner

Dear Commissioner Caldwell:

The Office of the Attorney General is in receipt of your request for the issuance of an official opinion.

Question Presented

May a retiree of the Public Employees' Retirement System (PERS), who is duly elected as a Transportation Commissioner, continue to draw retirement benefits and be paid an amount equal to or less than the statutory salary rate?

More specifically, may the elected official choose to remain retired and also be paid in accordance with Miss. Code Ann. Section 25-11-127(4)(b) at twenty-five percent (25%) of the retiree's average compensation?

Background Facts

In November 2019, you were elected to the position of State Transportation Commissioner for the Northern District of Mississippi. In January 2020, you took office. You are also a retired public employee who receives retirement benefits from PERS.

Pursuant to Miss. Code Ann. Section 25-11-127(4)(b), your stated intention was to elect to receive partial pay for your position as Transportation Commissioner and to continue to receive your benefits from PERS simultaneously.

Brief Response

It is the opinion of this office that you may not receive less than or waive any portion of your annual salary which is fixed by Miss. Code Ann. Section 25-3-31 at \$78,000 per year. Unless that amount (\$78,000) is twenty-five percent (25%) or less of your average retirement compensation, under Miss. Code Ann. Section 25-11-127(4)(b), you may not receive retirement benefits from PERS while serving as Transportation Commissioner

Applicable Law and Discussion

Public service is commendable and valuable to the State. There are many valid reasons for which a state agency or the state electorate may seek to bring someone who has retired from state employment back into service, including institutional knowledge and experience and a demonstrated dedication to serving the interests of the people of Mississippi.

It is of paramount importance to note here that nothing in Miss. Code Ann. Section 25-11-127 forces a retiree who chooses to reenter state service to forfeit their benefits from PERS. Rather it places certain conditions on a retiree's ability to receive PERS benefits and, at certain salary levels, a retiree must temporarily forego receipt of his/her retirement benefits – benefits which will resume at the end of the renewed service. The Legislature has, in fact, gone to some lengths to create parameters by which those who have served may serve again, offering their knowledge and experience, without simultaneously receiving both employment compensation and retirement benefits from Mississippi taxpayers.

Miss. Code Ann. Section 25-11-127(4) provides two options by which a PERS retiree may receive state compensation and retirement benefits simultaneously. It reads:

- (4) The provisions of this section shall not be construed to prohibit any retiree, regardless of age, from being employed and drawing a retirement allowance either:
 - (a) For a period of time not to exceed one-half ($\frac{1}{2}$) of the normal working days for the position in any fiscal year during which the retiree will receive no more than one-half ($\frac{1}{2}$) of the salary in effect for the position at the time of employment, or
 - (b) For a period of time in any fiscal year sufficient in length to permit a retiree to earn not in excess of twenty-five percent (25%) of retiree's average compensation.

Miss. Code Ann. Section 25-11-127(4)(a) requires that the retiree be able to work for half the normal working days of the position and be able to receive one-half ($\frac{1}{2}$) or less of the salary for that position. The position of Transportation Commissioner, however, has a salary fixed by statute and may not be paid at any other level, half or otherwise. Under Miss. Code Ann. Section 25-3-31, the “annual salaries of [certain] elected state and district officers are fixed...,” and that section specifies that the annual salary of a Transportation Commissioner is \$78,000. That salary

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may not be reduced, and it may not be waived by choice or by operation of Section 25-11-127(4)(a-b).

This conclusion is consistent with previous opinions that “an individual holding a position or office for which the salary is prescribed by statute may not waive that salary.” MS AG Op., *Stringer* (January 3, 2003). *See also* MS AG Op. *Lancaster* (August 14, 1991); MS AG Op. *Shepard* (August 31, 1994). To the extent this conclusion conflicts with our response to Question No. 3 in MS AG Op. *Higgins* (January 24, 2019), this opinion controls.

Miss. Code Ann. Section 25-11-127(4)(b) may allow for an elected Transportation Commissioner to receive both retirement benefits and his/her salary in accordance with Section 25-3-31. However, to do so, the annual salary for the position, which is \$78,000, may not exceed twenty-five percent (25%) of that Commissioner’s average retirement benefits.

Conclusion

For the reasons set forth herein, it is the opinion of this office that an annual salary fixed by Miss. Code Ann. Section 25-3-31 may not be reduced or waived and therefore the criteria of Miss. Code Ann. Section 25-11-127(4)(a) cannot be met and such official may not receive PERS retirement benefits while serving in that office.

Further, Miss. Code Ann. Section 25-11-127(4)(b) can only be satisfied if the full salary fixed by statute is twenty-five percent (25%) or less than the average retirement compensation. Therefore, if the salary of \$78,000 fixed by Miss. Code Ann. Section 25-3-31 is more than twenty-five percent (25%) of your average retirement compensation, you may not receive retirement benefits from PERS while serving as the Transportation Commissioner.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Kim Turner*

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