

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

November 29, 2018

Sollie B. Norwood, Senator  
Mississippi State Senate  
Post Office Box 20192  
Jackson, Mississippi 39289

Re: Application of Public Employees' Retirement System ("PERS") Regulations

Dear Senator Norwood:

Attorney General Jim Hood received your request for an opinion and assigned it to me for research and reply. Your letter asked whether the Public Employees Retirement System of Mississippi ("PERS")<sup>1</sup> may terminate the payment of retirement benefits to a PERS Retiree<sup>2</sup> who serves as a senator or representative in the Mississippi Legislature. Your letter stated your belief that this termination of benefits "unfairly" limits the rights of qualified retired public employees to serve in the Mississippi Legislature.

Based upon our review of the applicable provisions of the Mississippi Code and the regulations of PERS, this office has concluded that a PERS Retiree who serves as a senator or representative in the Mississippi Legislature does not forfeit his or her PERS retirement benefits, and PERS may not terminate the payment of those benefits if the PERS Retiree satisfies the requirements of Miss. Code Ann. Section 25-11-127(1)<sup>3</sup> and (4)<sup>4</sup>.

The matter is not inconsequential. PERS reportedly has 321,494 members<sup>5</sup> which equals approximately 26.5% of the number of Mississippians who voted in the 2016

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<sup>1</sup> PERS is "an agency of the State of Mississippi having all the powers and privileges of a public corporation..." Miss. Code Ann. Section 25-11-101.

<sup>2</sup> "PERS Retiree" refers to any former employee who has vested in the benefits provided by the Public Employees' Retirement System of Mississippi and has qualified and is receiving a retirement allowance along with any other benefits due and owing pursuant to law.

<sup>3</sup> There must be a ninety-day continuous separation from employment with the State. See Section 25-11-127(1).

<sup>4</sup> Generally, the PERS Retiree can receive retirement benefits and receive compensation from post-retirement state service on a half-time/half-pay basis determined upon using the time and pay of a full-time position, or the Retiree can receive retirement benefits and receive compensation, in a single fiscal year, of up to 25% of the average of their highest four (4) years of previous state service. See Section 25-11-127(4).

<sup>5</sup> PERS 2017 Comprehensive Annual Financial Report p. 35.

Presidential Election.<sup>6</sup> Full-time Employees<sup>7</sup> of the State of Mississippi and its state and local subdivisions are compelled to participate in the Public Employees' Retirement System as a "condition of their employment." Miss. Code Ann. Section 25-11-105(a)(i).<sup>8</sup> Full-time Employees of the State of Mississippi and its state and local subdivisions are compelled to contribute money to the Public Employees' Retirement System. Miss. Code Ann. Section 25-11-123(e). In exchange, such employees through long service become vested in PERS and are entitled to the payment of their vested and earned benefits upon qualifying retirement. Miss. Code Ann. Sections 25-11-111 - 112. See also Miss. Const. Art. 14, Section 272A (distributions are to be made "as in trust.").

As a general matter, PERS Retirees are expressly permitted by existing statutes to return to government employment without forfeiture of their retirement benefits. The reemployment of PERS Retirees by state, county, and local governments is common. Miss. Code Ann. Section 25-11-127, entitled "Reemployment of Retired Persons," states that "After the person has been retired for not less than ninety (90) consecutive days from his or her effective date of retirement . . . , he or she **may be reemployed while being paid a retirement allowance** under the terms and conditions provided in this section." Miss. Code Ann. Section 25-11-127(1) (emphasis supplied). Miss. Code Ann. Section 25-11-127(4) states that "[t]he provisions of this section **shall not be construed to prohibit any retiree**, regardless of age, **from being employed and drawing a retirement allowance**" as long as, generally speaking, the PERS Retiree works no more than half-time or the PERS Retiree's income from the reemployment does not exceed 25% of his or her former compensation. See Miss. Code Ann. Section 25-11-127(4) (emphasis supplied).

Because Miss. Code Ann. Section 25-11-127(4) creates a broad authorization through which PERS Retirees may be, and in fact often are, reemployed by the state, county and local governments while continuing to receive their retirement benefits, the question becomes whether serving as a legislator fits within the broad language of that code section. Miss. Code Ann. Section 25-11-127(4) states:

(4) The provisions of [Section 25-11-127] **shall not be construed to prohibit any retiree, [9]** regardless of age, from being employed and drawing a retirement allowance either:

(a) For a period of time not to exceed one-half (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 (1/2) of

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<sup>6</sup> November 28, 2016 Certificate of Vote (<http://www.sos.ms.gov/Elections-Voting/Pages/2016-General-Election.aspx>).

<sup>7</sup> The term "Employee" as used throughout this opinion shall have that meaning set forth in Miss. Code Ann. Section 25-11-103: "any person legally occupying a position in the state service, and shall include the employees of the retirement system created under this article."

<sup>8</sup> "Participation in PERS is mandatory for an employee in a covered position. An elected official is subject to mandatory participation in PERS if his or her position is not excluded by a Joinder Agreement or by law and if he or she receives a regular salary." PERS Member Handbook p. 12.

<sup>9</sup> Note that the statute extends to "any retiree" and contains no limitation on the branch in which the office or appointment resides.

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.

To determine the normal working days for a position under paragraph (a) of this subsection, the employer shall determine the required number of working days for the position on a full-time basis and the equivalent number of hours representing the full-time position. The retiree then may work up to one-half ( $\frac{1}{2}$ ) of the required number of working days or up to one-half ( $\frac{1}{2}$ ) of the equivalent number of hours and receive up to one-half ( $\frac{1}{2}$ ) of the salary for the position. In the case of employment with multiple employers, the limitation shall equal one-half ( $\frac{1}{2}$ ) of the number of days or hours for a single full-time position.

Miss. Code Ann. Section 25-11-127 (emphasis added). If serving as a legislator fits within either Section 127(4)(a) or 127(4)(b), then a PERS Retiree may be employed as a legislator and continue to receive his or her retirement benefits. We conclude that a legislator could fit within either provision as a matter of law and fact.

Section 25-11-127(4)(a) is a half-time/half-pay provision which permits a PERS Retiree to be reemployed with the State so long as he works no more than one-half of the time of a full-time position and receives no more than one-half the compensation of a full-time position. Miss. Code Ann. Section 25-11-127(4)(a). By statute, the half-time limitation is calculated either on the basis of days or hours worked.<sup>10</sup> A legislator serving on a "full-time basis" or "full-time equivalent position" would generally work 260 days per fiscal year or 2,080 hours per fiscal year. Therefore, a PERS Retiree who limited his or her work as a legislator to no more than 1,040 hours per fiscal year and who received no more than one-half of a legislator's salary<sup>11</sup> could serve as a legislator and continue to receive his or her retirement allowance pursuant to Section 25-11-127(4)(a).

Devoting no more than 1,040 hours to legislative duties does not legally disqualify a PERS Retiree from serving as a member of the Mississippi Legislature. While some members of the legislature may expend 2,080 hours per fiscal year on legislative duties, many legislators hold regular full-time jobs in addition to serving in the legislature. See **Jones v. Howell**, 827 So. 2d 691, 693 (Miss. 2002) ("John Read, also a legislator and pharmacist..."); **Dillard v. Musgrove**, 838 So. 2d 261, 264 (Miss. 2003) (recognized

<sup>10</sup> To calculate the one-half of the "normal working days" to which a PERS Retiree is limited, Section 25-11-127(4) defines the "normal working days" for a position as the "number of working days for the position on a full-time basis and the equivalent number of hours representing the full-time position" as determined by the employer. Miss. Code Ann. Section 25-11-127.

<sup>11</sup> Miss. Code Ann. Section 5-1-41 provides that a representative or senator receives \$10,000.00 per session and \$1,500.00 for "expenses incidental to his office" for all full months during which the legislature is not in session.

the fact that service in the legislature takes time away from other employment and business enterprises). Members of the legislature have included actively practicing attorneys, accountants, pharmacists, physicians, pastors, real estate agents, farmers, optometrists, paramedics, business owners, and insurance agents. Those legislators balance their regular full-time employment with their part-time service in the legislature. In most years, the legislature only meets over a period of 90 calendar days, and the salary is only \$10,000 plus office expenses when out of session. See Miss. Const. Art 4, Section 36; Miss. Code Ann. Section 5-1-41. As a financial reality, most legislators hold regular jobs to augment their legislative salary. Legislators who divide their time between their legislative duties and their private sector employment are not subjected to a penalty or forfeiture of their non-legislative salary or benefits.

The fact that many legislators are actively employed in addition to their state service underscores that legislators have the constitutional discretion to judge for themselves how much time to devote to their legislative duties and how much to devote to their regular professions. Part-time service as a legislator is both common and legally permissible. See **Fairly v. Western Union Tel. Co.**, 73 Miss. 6, 18 So. 796 (1895) ("If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office."). While an elected official is presumed to be available for official duties at all times, the actual hours necessary to discharge the duties of the office are left to his or her reasonable discretion. See MS AG Op., Jones (April 23, 2010). "Elected public officials are responsible to the electorate for the manner in which they discharge their official duties and must exercise their own, individual sound judgment and discretion in determining how and when they shall discharge such duties." *Id.* Just as a legislator who is also a practicing attorney may be unavailable for constituent services during some periods of time during the nine months the legislature is not in session because of the demands of his or her law practice, a PERS Retiree may be unavailable for constituent services at certain times in order to stay within the 1,040 hours per fiscal year limitation. The voters' decision to elect a practicing attorney to the legislature is no less valid than the voters' decision to elect a PERS Retiree.

In the alternative, some but not all PERS Retirees could serve as members of the legislature and retain their retirement allowance under Section 25-11-127(4)(b). Under Section 25-11-127(4)(b), a legislator may work for a period of time in any fiscal year sufficient in length to permit the retiree to earn not in excess of twenty-five percent (25%) of the retiree's average compensation. By way of example, under Section 25-11-127(4)(b), a chancellor who retired after 25 years of service could accept any position in state government which pays no more than \$34,000.00 annually,<sup>12</sup> and still receive his or her retirement allowance. Pursuant to statute, a legislator receives \$10,000.00 per session and \$1,500.00 for "expenses incidental to his office" for all full months during which the legislature is not in session. Miss. Code Ann. Section 5-1-41. Therefore, a retired chancellor or other similarly situated PERS Retiree could serve in the legislature

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<sup>12</sup> From and after January 1, 2016, chancellors receive compensation of \$136,000. Miss. Code Ann. Section 25-3-35. Twenty-five percent of \$136,000.00 is \$34,000.00.

without any limitation on the number of hours worked, because the legislative compensation falls below the 25% limitation in Section 25-11-127(4)(b).<sup>13</sup>

We understand that a PERS regulation prohibits any PERS Retiree from serving as a state elected official and continuing to receive his or her earned retirement benefits.<sup>14</sup> See PERS Code Miss. R. 27-4-1:34(102)(1). In effect, this means that a school teacher who is a PERS Retiree receiving \$12,000 in retirement benefits would be required to permanently forfeit \$48,000 in vested and earned retirement payments during the four years that the teacher serves in the legislature. We think that this regulation is contrary to the current language of Miss. Code Ann. Section 25-11-127 as discussed above.<sup>15</sup>

It is noted that Miss. Code Ann. Section 25-11-127(6) permits a PERS Retiree to serve in a "municipal or county elective office" while continuing to receive his or her retirement allowance if the more restrictive conditions in Section 25-11-127(6) are met. It would be incorrect to assume that since Section 25-11-127(6) authorizes PERS Retirees to serve as municipal and county elected officials but is silent on state elective offices, Section 25-11-127(6) must be construed to prohibit PERS Retirees from serving in state elective offices. According to the principle of statutory construction known as *expressio unius est exclusio alterius*, "where a statute enumerates and specifies the subject or things upon which it is to operate, it is to be **construed as excluding** from its effect all those not expressly mentioned or under a general clause." *Shelter Mut. Ins. Co. v. Dale*, 914 So. 2d 698, 702 (Miss. 2005) (emphasis supplied). However, the doctrine of *expressio unius* does not apply when the language of the statute indicates that the list is not to be construed as exhaustive or exclusionary. Here, Section 25-11-127(4) – which precedes Section 25-11-127(6) – clearly states that "[t]he provisions of this section **shall not be construed to prohibit any retiree**, regardless of age, from being employed and drawing a retirement allowance" who meets the requirements of Section 25-11-127(4)(a) or (b). Miss. Code Ann. Section 25-11-127(4) (emphasis supplied). The doctrine of *expressio unius* cannot be used to "construe" Section 25-11-127(6) as excluding PERS Retirees from serving in state elective office when Section 25-11-127(4) states that Section 25-11-127 "shall not be construed to prohibit any retiree" who meets the requirements of Section 25-11-127(4)(a) or (b) from returning to state employment. The language of Section 25-11-127(4) indicates that the lack of a

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<sup>13</sup> In contrast, to require the chancellor to forfeit his or her earned yearly retirement allowance of \$68,000 during the four years he served in the legislature would impose a forfeiture penalty of \$272,000.00 on the retired chancellor/legislator.

<sup>14</sup> In years past, an agency's interpretation of its statutes was entitled to deference. In 2018, the Mississippi Supreme Court abolished that deference. See *King v. Mississippi Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018).

<sup>15</sup> Our office was last asked to directly opine on the application of Miss. Code Ann. Section 25-11-127 to legislators in 1980. See MS AG Op., Casey (May 6, 1980) (concluding that the statute prohibited a retiree from receiving retirement benefits while serving in the legislature). In the intervening almost forty years, the statute has been materially revised, including, but not limited to, the deletion of a provision explicitly prohibiting "any pensioner who has been elected to public office after retirement" from continuing to "draw retirement benefits while so reemployed." See Miss. Code Ann. Section 25-11-127 (1983). In light of the significant amendments to the statutes, we have reexamined our previous opinion.

reference to state elected office in Section 25-11-127(6) is not to be construed as prohibiting a PERS Retiree from serving in state elective office.<sup>16</sup>

It is further noted that Miss. Code Ann. Section 25-11-127 generally prohibits a PERS Retiree from returning to work on a full-time basis with the State and that Miss. Code Ann. Section 25-11-109 states that "[a]ny state or local elected official shall be deemed a full-time employee for the purpose of creditable service." Miss. Code Ann. Section 25-11-109. However, Section 25-11-109 is not a bar to PERS Retirees serving as a member of the legislature and receiving retirement benefits under Section 25-11-127(4) for two reasons.

First, Miss. Code Ann. Section 25-11-109 only "deems" state and local officials to be "full-time" for the "purpose of creditable service." Miss. Code Ann. Section 25-11-109. "Creditable service" is, generally speaking, the measurement of the time an employee works for the government before retirement that is used to calculate when a person may retire and how much the person receives in benefits upon retirement. See Miss. Code Ann. Section 25-11-111(a)(1). By statute, once a person retires from government, they no longer earn "creditable service" toward retirement even if that retired person returns to work under Miss. Code Ann. Section 25-11-127. See Miss. Code Ann. Section 25-11-127(5) (a reemployed "retiree shall not receive any additional creditable service in the retirement system..."). Because a PERS Retiree is no longer earning "creditable service," Miss. Code Ann. Section 25-11-109's "deeming" of state elected officials to be "full-time employee[s] for the purpose of creditable service" is not a bar to a PERS Retiree serving in the legislature and continuing to receive his or her retirement allowance pursuant to Miss. Code Ann. Section 25-11-127(4).

Second, interpreting Miss. Code Ann. Section 25-11-109 to bar all state and local elected officials from serving in the legislature and receiving retirement benefits under Section 25-11-127 would place that statute in conflict with other statutory provisions and in conflict with PERS' own interpretation of Section 25-11-127(6). Miss. Code Ann. Section 25-11-109 applies to both state and local elected officials. Miss. Code Ann. Section 25-11-109 ("Any state **or local** elected official shall be deemed a full-time employee . . .") (emphasis supplied). If Miss. Code Ann. Section 25-11-109 bars a PERS Retiree from serving in a state elected office, it must also, therefore, bar a PERS Retiree from serving in a local elected office. However, Miss. Code Ann. Section 25-11-127(6) states that a PERS Retiree may serve in a local elective office. The fact that the

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<sup>16</sup> There are further reasons why using the doctrine of *expressio unius* in this manner would be incorrect. First, neither Miss. Code Ann. Section 25-11-127(4) nor 127(6) is ambiguous, and there is no need to apply other principles of statutory construction. See **Mississippi Baptist Health Sys., Inc. v. Harkins**, 245 So. 3d 370, 374 (Miss. 2018). Second, an interpretation that would deprive a PERS Retiree of his or her retirement payments would be a deprivation of property and penal in nature. If the PERS statutes were intended to work in such a manner, the statutes would be strictly construed in favor of the individual. See **Hogan v. Mississippi Bd. of Nursing**, 457 So. 2d 931, 934 (Miss. 1984). Finally, statutes must be interpreted to avoid an unconstitutional result. If the legislature were to have enacted statutes permitting PERS Retirees to run for local and municipal office while financially penalizing any PERS Retirees who sought to unseat a member of the legislature, such statutes would raise serious Due Process, Equal Protection and First Amendment concerns.

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legislature authorizes a PERS Retiree to serve in a local elective office in Miss. Code Ann. Section 25-11-127(6) is a clear indication that Miss. Code Ann. Section 25-11-109's treatment of "creditable service" is not a bar to a PERS Retiree serving in a state or local elected office.

In conclusion, by statute, the PERS Retiree members have vested rights to their benefits, are entitled to receive their benefits and, if qualified and elected, they have a right to serve as a representative or senator in the Mississippi Legislature without forfeiture of their PERS retirement benefits, so long as they meet the conditions imposed by Section 25-11-127(1) and (4).

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



James Bobo  
Special Assistant Attorney General

OFFICIAL OPINION