June 2, 2000
L-2000-19

TO : Debbie McGovern
Reconsideration Specialist

FROM : Nancy V. Russell
General Attorney

SUBJECT : Application of LPE Work Deductions to Public Officials

This is in response to your request for a determination as to whether Robert R.'s employment as Mayor of the Village of W., Ohio constitutes last person employment (LPE). As explained below, it is my opinion that the employment does constitute LPE and therefore, his annuity is subject to appropriate LPE work deductions.

Information in file indicates Robert R. was serving his second term as Village Mayor when he quit working for the railroad industry and filed an application for an annuity payable under the Railroad Retirement Act (RRA). Mr. R. was awarded an annuity beginning October 30, 1999, reduced for LPE work deductions. He was recently reelected to a third term as Mayor and objects to the reduction of his annuity for such employment. In support of his position, he argues the following:

- He is not an employee of the Village;
- The Village is not included within the definition of employer as defined in section 2(e)(1) of the Railroad Retirement Act (45 U.S.C. § 231a(e)(1));
- His present employment as Mayor is new employment;
- The reduction applied to his annuity is excessive in light of the amount of compensation he receives for his service as Mayor; and
- The reduction of annuities for service as an elected officer should be prohibited as such reduction is against public policy.

A review of the legislative history of work restrictions, and their application to elected public service, is helpful in evaluating Mr. R.'s claims.

Work restrictions related to non-railroad employment have existed since the Railroad Retirement Act of 1937. Until the Act was recodified in 1974, an individual was barred from receiving an annuity unless he ceased to render compensated service to any person. 45 U.S.C. § 228b(a). The prohibition against continuing in employment was included to support the major purpose of annuities payable under the Act, that is, to provide benefits for persons who were completely retired and who were dependent upon such benefits for their livelihood. Legal Opinion L-76-110.2. Also see United States v. Bush, 255 F.2d 791, 793-794, for a detailed discussion on the legislative history of the statutory work restrictions in the Railroad Retirement Act of 1937. The Board held that this statutory work restriction included service as an elected public officer (Legal Opinion L-42-300) and courts agreed that the relevant statutory provisions included a governmental entity as a "person" and that they also applied to individuals elected to public office. Burke v Railroad Retirement Board, 165 F.2d 24 (D.C. 1947). Davenport v. Railroad Retirement Board, 453 F.2d 185 (5th Cir. 1972).

When the Act was recodified in 1974, the prohibition against continuing to perform compensated service was carried over to section 2(e)(1) of the Railroad Retirement Act of 1974. In addition, the following provision was added to section 2(e)(1), excluding employment as an elected public official from the work restriction:

> As used in this subsection, the term "compensated service" shall not include any service as an elected public official of the United States, a State, or any political subdivision of a State.

Legislative history indicates the exemption for elected public service cited above was introduced by Congress to provide that an individual who is an elected public official could receive a railroad annuity "without being required to resign his elected office." S. Rep. No. 1163, 93d Cong., 2d Sess. 26 (1974).

In 1988, section 2(e)(1) of the RRA was revised to provide that an individual no longer has to cease non-railroad employment in order to be entitled to an annuity. Section 2(e)(1) now reads, in its entirety, as follows:

> No individual shall be entitled to an annuity under subsection (a)(1) of this section until he shall have ceased to render compensated service to an employer as defined in section 231(a) of this title.

As section 2(e)(1) now reads, the bar on entitlement to an annuity still exists if an individual has not stopped working in the railroad industry, but entitlement is no longer barred if an individual continues to work for his last person non-railroad employer. The restriction on work for the last person non-railroad employer was replaced with the introduction of deductions applicable to the tier II component of an annuity and any supplemental annuity payable. The statutory authority for the deduction, commonly referred to as "last person employment" (LPE) work deductions, is found in section 2(f)(6) of the Railroad Retirement Act (45 U.S.C. § 231a(f)(6)). Without explanation, Congress did not exclude elected public service from LPE work deductions, and consequently, such service is now treated in the same manner as any other LPE.

Having reviewed the history of work restrictions involving service as an elected public official, we now turn to Mr. R.'s arguments as to why his annuity should not be reduced for LPE work deductions.

Initially, Mr. R. argues that he is not an employee of the Village, but is self-employed. In support of his claim that he is not a Village employee, Mr. R. cites sections 124.57 and 145.01 of the Ohio Revised Code. Section 124.57 provides that no officer or employee in the classified service shall participate in partisan political activities, other than to vote or express their political opinions. However, Mr. R. is not part of the classified service, but is part of the unclassified service as defined in section 124.11 of the Ohio Revised Code. That section provides, in part, as follows:

> (A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter: (1) All officers elected by popular vote or persons appointed to fill vacancies in such offices. Ohio Rev. Code Ann. § 124.11 (Anderson 1993).

Section 145 of the Ohio Revised Code referenced by Mr. R. includes provisions related to the Ohio Public Employee Retirement System (PERS). Section 145.01 defines those individuals considered to be a "public employee" as that term is used in section 145, and refers to persons holding an office, not elective. However, it should be noted that section 145.01 merely defines those employees for whom membership in PERS is compulsory. See § 145.03 of the Ohio Revised Code. However, if an elected official wishes to join PERS, the official may do so under section 145.20 of the Ohio Revised Code. That section provides, in part, "Any elective official of the state of Ohio or of any political subdivision thereof having employees in the public employee retirement

system shall be considered as an employee of the state or such political subdivision, and may become a member of the system upon application..." (emphasis added). Ohio Rev. Code Ann. § 145.20 (Anderson 1993).

The inclusion of elected officers in the unclassified service and their ability to opt into PERS on the basis of their employee status clearly establishes the existence of an employee-employer relationship.

Mr. R. next argues that even if he is an employee of the Village, the RRA reduces benefits if an individual is rendering compensated service to an employer as defined in the RRA and that he is not subject to the reduction because public service as Mayor is not within the statutory definition of employer. The section of the RRA which Mr. R. appears to be referring to is section 2(e)(1) of the RRA (45 U.S.C. § 231a(e)(1)) which, as noted above, presently bars entitlement to an annuity if an individual does not cease working for his railroad employer. However the statutory provision which requires the reduction in Mr. R.'s annuity is found in section 2(f) of the RRA (45 U.S.C. § 231a(f)) which provides, in relevant part, as follows:

> (6)(A) Except as provided in subparagraph (B) –
>
> > (i)That portion of an annuity for any month of an individual as is computed under section 3(b) and as adjusted under section 3(g), plus any supplemental amount for such month under section 3(e), . . . shall each be subject to a deduction of $1 for each $2 of compensation received by such individual from compensated service rendered in such month to the last person, or persons, by whom such individual was employed before the date on which the annuity of such individual under subsection (a)(1) began to accrue.
> >
> > * * *
> >
> > (B) Any deductions imposed by this subdivision for any month shall not exceed 50 percent of the annuity amount for such month to which such deductions apply. (45 U.S.C. § 231a(f)(6)).

(Section 3(b) of the Railroad Retirement Act (45 U.S.C. § 231b(b)), referred to in section 2(f)(6) above, provides for the computation of the tier II component.)

To determine whether the reduction in section 2(f)(6) applies to Mr. R.'s annuity, we must determine if his service as Village Mayor is compensated service for the last person, or persons, by whom he was employed prior to his annuity beginning date of October 30, 1999. Section 1(l) of the RRA (45 U.S.C. § 231(l)) defines the term "person" as meaning an individual, a partnership, an association, a joint-stock company, a corporation, or the United States or any other governmental body." While Mr. R. is accurate in his claim that public service as Mayor is not within the statutory definition of "employer", it is clearly within the scope of the statutory definition of "person." (Also see Davenport v. Railroad Retirement Board, 453 F.2d 185 (5th Cir. 1972) wherein the court held that work for a municipal government was within the scope of the work restrictions under the Railroad Retirement Act of 1937.) Having previously determined the existence of an employee-employer relationship, it is clear the Village of W. qualifies as Mr. R.'s last person employer.

Mr. R. next argues that his annuity should not be subject to LPE work deductions because his present employment as Mayor is "new employment" which began January 1, 2000, after his annuity beginning date. The fact that Mr. R. is now serving a new term as Mayor is irrelevant to the issue of whether his annuity is subject to LPE work deductions. The statutory language of the RRA does not refer to a "term of employment". Rather, the RRA provides that the reduction applies to an individual's annuity in any month in which compensated service is rendered to the last person, or persons, by whom such individual was employed before the date on which the annuity of such individual began to accrue. The Village of W. employed Mr. R. prior to his annuity beginning date of October 30, 1999, and continues to employ him today.

Mr. R. also argues that the reduction in his annuity is excessive, in light of the compensation he receives. Section 2 (f)(6) provides that the relevant components of an individual's annuity are subject to a deduction of $1 for each $2 of compensation received, not to exceed 50 percent of the annuity components for such month to which such deductions apply. There are no statutory provisions that allow for a lesser reduction based upon the amount of compensation received.

Finally, Mr. R. argues that reducing his annuity due to the compensation he receives from his employment as Village Mayor is against public policy as it discourages individuals from participating in public office.

Prior to the 1974 Act, when relevant statutory provisions mandated an individual cease all employment, including elected public service, to be entitled to an annuity, the Board adopted a policy whereby continued service as an elected public officer would not bar entitlement. Service as an elected public officer was exempt from the work restrictions then in effect if the office was one sought solely because of the dignity and honor involved or the desire to render public service. Legal Opinion L-42-300. Also see Legal Opinions L-51-115, L-52-547, L-52-739. The amount of compensation received was a critical factor in determining whether public service was considered to be "compensated service" that precluded annuity entitlement, or service performed "solely because of the dignity and honor involved or the desire to render public service", thereby allowing entitlement to an annuity. If the compensation received was greater than that amount which an individual receiving a disability annuity under the RRA could earn without adversely affecting his eligibility for that benefit, then the public service was considered to be "compensated service" and barred entitlement to an annuity. Legal Opinion L-76-110.

The above policy was no longer apropos upon the introduction of the exemption for elected public service with the Railroad Retirement Act of 1974. The exemption was introduced because Congress determined that the employment restriction provisions under the Railroad Retirement Act of 1937, as applied to elected public officials, "resulted in undue hardship for a limited number of people." Therefore, the employment restrictions were modified to provide that an individual who was an elected public official could receive a railroad annuity "without being required to resign his elected office." S. Rep. No. 1163, 93d Cong., 2d Sess. 26 (1974).

When the Railroad Retirement Act was amended in 1988, and the ban on non-railroad employment was replaced with LPE work deductions, Congress did not exclude service as an elected public official from employment subject to LPE work deductions. The legislative history is silent as to the reason Congress did not exempt such service, when it had provided an exemption from the work restrictions in effect prior to the 1988 amendments. However, the legislative history behind the exemption introduced in 1974 as previously recounted provides the foundation for a reasonable inference.

Prior to the 1988 amendments, an individual had to cease all compensated service to be entitled to an annuity. As noted above, Congress introduced an exception in 1974 for individuals in elected public office so that they would not have to resign their office in order to receive an annuity. Subsequent to the

1988 amendments, an individual no longer needs to end all employment to be entitled to an annuity, but only needs to end employment in the railroad industry. Therefore, the justification for the exclusion of service as an elected public official no longer exists.

Additionally, it should be noted that one of the purposes in originally enacting the work restrictions on non-railroad employment was to insure that an individual engaged only in railroad employment at the time of his retirement would not be in a worse position than an individual who had left the railroad industry and engaged in non-railroad employment. Legal Opinion L-77-285. Under the present provisions, a railroad employee is required to cease his service in order to obtain an annuity, while an individual who left the railroad industry can receive his annuity and at the same time, continue in his non-railroad employment. Requiring a reduction in that portion of an individual's annuity that is based solely on his railroad compensation for continued post-retirement non-railroad employment helps to compensate for the burden placed on the career railroad employee who must cease railroad employment, and thereby essentially cease all employment.

The rationale behind the statutory exclusion in 1974 was the same basis for the policy adopted by the Board prior to 1974 and that justification no longer exists. That is, an individual is no longer required to resign from non-railroad employment to become entitled to an annuity under the RRA. Furthermore, Mr. R.'s annual salary of $6,000.00 is greater than that amount which an individual receiving a disability annuity under the RRA can presently earn without adversely affecting his eligibility for that benefit. See 45 U.S.C. § 231a(e)(4). Therefore, even under the pre'74 policy, Mr. R.'s employment as Village Mayor would not be exempt from LPE work deductions.

To summarize, the Village of W. is the last person by whom Mr. R. was employed prior to his annuity entitlement. Section 2(f)(6) of the RRA (45 U.S.C. § 231a(f)(6)) provides for a reduction where an individual receives compensation for services performed for the last person, or persons, by whom he was employed prior to his annuity entitlement. Section 1(l) of the RRA (45 U.S.C. § 231(l)) specifically includes a governmental body within the definition of "person." The 1988 amendments brought service as an elected public officer squarely within the scope of employment subject to LPE work deductions, as no provisions were included to exclude such service. Furthermore, the justification for the previous exclusion of elected public service where last person employment restrictions were involved no longer exists. The plain language of the RRA mandates reducing Mr. R.'s annuity for LPE work deductions.