

PENSIONS: There is no incompatibility in a retired pensioned policeman of the City of Maplewood serving as city councilman of the City of Maplewood so long as such retired pensioned policeman, in his capacity as councilman, can take no action with regard to the amount of pension that a retired policeman of Maplewood should receive.

JOHN M. DALTON

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March 12, 1953

J. C. JOHNSEN

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Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"We would deeply appreciate it if you would let us have the opinion of your office on the following questions:

"1. Can a retired police officer of a third class city who is receiving a pension during his retirement, at the same time hold office as a councilman or alderman of said city and draw a salary for that service?

"2. Can such retired police officer waive his pension during the time he serves as alderman or councilman and then resume his pension when his service on the council has ended."

The problem which you present is, so far as we are able to determine, unique. The nearest analogy to it seems to be that of "incompatible offices," which, we believe, furnishes some guidance in this matter. By "incompatible offices" is meant the holding, by the same person, of two or more offices the duties of which are conflicting. This matter is clearly stated in the case of State v. Bus, 135 Mo. 325. At l.c. 338 of its opinion, the court stated:

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"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

From the above it would appear that incompatibility consists of conflict in function, and that one person may hold two or more offices if the proper discharge of the duties of each may be performed by the same individual.

However, the fact situation which you present is not one

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in which the same person holds, or seeks to hold, two or more offices, but is one in which a person who receives a pension from a city as a retired police officer seeks to know whether he may properly serve as councilman of his city.

We believe that the only question in this regard is whether there would be any conflict in interest in such a situation. We further believe that such conflict could only arise if such person, in his capacity as councilman, would be in a position to exert influence in having his pension raised. If he could we believe that such incompatibility would exist; but that if he could not that such incompatibility would not exist.

In this regard we note the opinion forwarded by you to us, of Charles E. Altenbernd, city attorney of Maplewood, which is the city in question.

That opinion states that Ordinance No. 3039, which is the ordinance which provides for and fixes the amount of the retired policeman's pension, was passed under the provisions of Section 7075, RSMo 1939, which is now Section 78.200, RSMo 1949. Ordinance No. 3039 was, the opinion informed us, submitted to the city council by petition, signed by electors of the city equal in number to twenty-five per cent of the votes cast for all candidates for mayor at the last preceding general election, and contained a request that said ordinance be submitted to a vote of the people if not passed by the city council. This ordinance was not passed by the city council, but was submitted to a vote of the people, and was adopted at an election held November 2, 1948, becoming effective thirty days thereafter.

The opinion then calls attention to the provisions of Section 7075 (now Section 78.200) which provides that:

"If a majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people."

In the 1939 Revised Statutes of Missouri the above portion of the quoted statute was contained in Section 7075 (now Section

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78.200). In the 1949 Revised Statutes of Missouri the above is found in Section 78.210.

The Altenbernd opinion concludes:

"It is, therefore, my conclusion that since the proposed ordinance was adopted by a vote of the people, a councilman of the City of Maplewood would have no opportunity to vote upon the question of whether or not pensions of retired police officers could be lowered or raised since the ordinance could only be amended by a vote of the people and the pensions provided for could only be determined by a vote of the people."

From the above it would seem to be clear that the retired pensioned policeman would not, as councilman, be in a position, in his capacity as councilman, to have any influence in raising his pension, and that therefore no conflict or incompatibility would be present.

CONCLUSION

It is the opinion of this department that there is no incompatibility in a retired pensioned policeman of the City of Maplewood serving as city councilman of the City of Maplewood so long as such retired pensioned policeman, in his capacity as councilman, can take no action in regard to the amount of pension that a retired policeman of the City of Maplewood should receive.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Respectfully submitted,

JOHN M. DALTON
Attorney General

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