



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

November 28, 1972

Honorable Robert S. Calvert
Comptroller of Public Accounts
State Finance Building
Austin, Texas 78711

Opinion No. M-1269

Re: May an elected official who is eligible for retirement under the Employees Retirement System of Texas cease performing the functions of his office prior to qualification of his successor in office, in view of Art. XVI, Sec. 17, Texas Constitution?

Dear Mr. Calvert:

In your recent opinion request you presented the following information and questions:

"In view of your holdings in your Opinion M-627 with regard to District Judges, I am asking the following questions:

"1. If a District Attorney or any other elected official, each of whom are eligible for service retirement [under the Texas Employees Retirement System] and each of whom makes application to retire on a date of his choosing, which date meets the retirement laws, does this fix the date the office is vacated and the date he is eligible to execute retirement options and the date he is to be removed from the payroll to be placed on the following day on the retirement payroll, even if no successor has qualified?

"2. In your Opinion M-760, you have held that officers may abandon their offices under certain conditions. If a District Attorney or any other elected official, including members of the Legislature, submits a letter to the Governor reading similar to the following:

"I, John Doe, duly elected or appointed District Attorney of the _____ Judicial District, being

hereby eligible for retirement, do hereby state that I am retiring on (some future date) and as of that date, I am abandoning and relinquishing said office and will no longer perform the duties of said office after that date.'

"Would this constitute abandonment of the office and enable said officer to be placed upon the retirement payroll on the following date, provided said date meets the retirement laws?" (Brackets ours.)

Our answer to your first question is yes. Article XVI, Section 17 of the Texas Constitution, provides that "all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." A district attorney is an officer of the State. State v. Johnson, 12 Tex. 231 (1854); Lackey v. State, 190 S.W.2d 364 (Tex.Crim. 1945). Article XVI, Section 62, subsection (a) of the Texas Constitution, which was adopted subsequently to Section 17 of the same Article, creates the Employees Retirement System of Texas. Pursuant to this constitutional provision the Legislature enacted Article 6228a, Vernon's Civil Statutes, which establishes an administrative board, the qualifications for membership in the State's retirement system, and the method for applying for service retirement benefits.

We have previously held in Attorney General's Opinion M-627 (1970) that:

"In view of the express provisions of Section 1-a of Article V of the Constitution of Texas and Subdivision (a) of Section 2 of Article 6228b, it is our opinion that a judge who is eligible for retirement has the constitutional right to retire. Therefore, the provisions of Section 17 of Article XVI of the Constitution of Texas should not be construed so as to prevent a judge from retiring who is eligible for retirement if he desires to avail himself of the provisions of Section 1-a of Article V of the Constitution of Texas and the provisions of Article 6228b, Vernon's Civil Statutes (Judicial Retirement Act).

". . .

". . . A judge eligible for service retirement who makes application to retire on a date of

his choosing thereby fixes the date the office is vacated, the date he is eligible to exercise retirement options and the date he is to be removed from the judicial payroll to be placed on the following day on the retirement payroll."

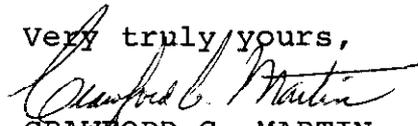
Our opinion is that Article XVI, Section 17, Texas Constitution, must be construed so as not to deny one who has a right under Article XVI, Section 62, Subsection (a), Texas Constitution, and the statutes enacted pursuant thereto, and who has met the requirements contained therein, the opportunity to validly exercise that right. To do so in this instance would be to allow one other than the retiree to determine the date of the retiree's retirement, a determination that only the retiree may make under Article 6228a, Vernon's Civil Statutes.

You are accordingly advised that under the facts submitted, the district attorney has the constitutional right to make application to retire on a date of his choosing, thereby fixing the date the office is vacated. Article XVI, Section 17, Constitution of Texas, requiring all officers to perform their duties of office until their successor shall be duly qualified, is therefore not applicable in this situation of retirement under Article XVI, Section 17, Constitution of Texas, and must yield thereto. Consequently, no one may collect compensation for the period of time the office became vacant and until the successor qualifies. In view of our answer to your first question it is unnecessary to answer your second question.

S U M M A R Y

A district attorney eligible for service retirement who makes application to retire on a date of his choosing thereby fixes the date the office is vacated, and the date he is eligible to execute retirement options and the date he is to be removed from the payroll to be placed on the following day on the retirement payroll, even though his successor has not qualified.

Very truly yours,



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