

unexpired term, but that it does not disqualify him to take some other office or to be elected or appointed to a new term of the same office.

In re Recall Election in City of Hackensack, 154 A.2d 639 (N.J. 1959), is squarely in point. There, as here, the city's charter act did not expressly prohibit a recalled councilman from being eligible to succeed himself for the unexpired term. The court held, however, that the names of the councilmen who were subject to the recall election should be removed from the ballot as candidates to succeed themselves. *Accord*: *Recall Bennett Committee v. Bennett*, 249 P. 2d 479 (Ore. 1952), and cases therein cited; *State ex rel. Thompson v. Crump*, 183 S.W. 505, 507 (Tenn. 1916). In the case last cited, the Tennessee Supreme Court said that

. . . when one is removed from an office, he is removed for the current term, and he cannot thereafter be reelected to that term. This is so because the term is part of the office.

Accordingly, when defendants were removed from the offices of mayor and vice mayor, they were deprived of the right to exercise certain functions and receive certain compensation, and they were deprived of that right for their terms then current. . . .

Thus, in accordance with what appears to be the great weight of authority, it must be held that a city councilman who is subject to a recall election is disqualified to become a candidate for election to the unexpired term of the office and that, by reason of his disqualification, his election, if an election were to be held, would be void.

Your question is, therefore, answered in the negative.

073-350—September 19, 1973

RETIREMENT

PROVISIONS FOR MUNICIPAL OFFICERS

To: Harvey W. Perry, City Clerk, Live Oak

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

Is an elected city official who will not have served as such for twenty consecutive years until after October 1, 1973, entitled to the pension benefits of former §165.25, F. S. (1972 Supp.), and if not, is there any way in which the municipality can provide equivalent benefits to such official?

SUMMARY:

An elected city official who will not have completed twenty consecutive years of elective municipal service by October 1, 1973, is not entitled to the pension benefits of former §165.25, F. S. [amended and renumbered as §121.20, *id.*, by Ch. 73-129, Laws of Florida], if another retirement system is available to him on that date. However, under Ch. 73-129, *supra* [Section 121.20(3), *id.*], a city may provide a special contributory plan for its elected officials; or, in recognition of the loss of the pension benefits provided by §165.25, it may appropriate funds to its elected officials who have been elected to a term that, if served, will constitute twenty or more years of consecutive elective service with the municipality, sufficient to enable such officials to buy up their past years of service in the Florida Retirement System (or in

another retirement system adopted by the city and available to its elected officials, if possible under that system).

It appears that the City of Live Oak adopted a retirement plan a year-and-a-half or two years ago and that you are participating in the plan, even though you were not able to make any contributions to cover your back years of service. Your twenty years of consecutive elective service with the city will be completed in June 1974. In these circumstances, I have no alternative but to advise that you are not eligible to claim the benefits of former §165.25, *supra*. I ruled in AGO 073-251 that, after October 1, 1973, a municipality must make the pension payments required by §165.25 to its elected municipal officials only if no other retirement plan is available to such officials. Accord: Attorney General Opinion 073-316, in which I advised that when another retirement plan is available to elected municipal officials, an elected official's right to a pension under §165.25 must be exercised prior to October 1, 1973, the effective date of Ch. 73-129, Laws of Florida.

Your attention is, however, directed to the following provision of law, which was added by §4 of Ch. 73-129, *supra*, to the provisions of former §165.25, *supra*, and transferred to §121.20, F. S., as subsection (3) thereof:

(3) Each city or town may, by ordinance, establish a contributory retirement system for those officials defined in subsection (2). The rules for participation, the amount of the official's contributions, and the method of appropriation and payment may be determined by ordinance of the city or town.

By adopting the amendment to §165.25, *supra*, as a part of the Municipal Home Rule Powers Act, Ch. 73-129, *supra*, the legislature obviously intended to delegate to municipalities the power to prescribe by home rule ordinance a contributory retirement plan for its elected officials; and I have the view that the express delegation of power made in that act may be exercised by a municipality on or after October 1, 1973, to provide a special contributory plan for its elected officials separate and apart from that generally available to officers and employees alike. As noted above, the "rules for participation, the amount of the official's contributions, and the method of appropriation and payment" of funds for such a special plan for elected municipal officials may be determined by the ordinance under which the special plan is established; and it would appear that, under this broad authority, a city could make its contributions to such a special plan on behalf of its elected officials for their years of elective service to the city as comprehensive as deemed desirable by the city's governing body.

It might be noted also that, under Ch. 73-129, *supra*, a municipality has the power to adopt home rule ordinances "concerning any subject matter upon which the state legislature may act" with certain exceptions thereafter named. Obviously, the legislature, in adopting the provision of Ch. 73-129 here in question, did not realize that a number of elected municipal officials might be caught by the cut-off provision of the act with only a few months or a year or two to serve on an elective term of office that would, in fact, give them more than twenty years of consecutive elective municipal service and thus would entitle them to the benefits of §165.25, *supra*, had it not been amended by the 1973 act (or who would continue to serve out their elected term of office, were it not for the cut-off provision of the 1973 act). In these circumstances, I am inclined to the view that, in recognition of these forfeited pension rights, a municipality could validly provide funds to such elected officials sufficient to enable them to buy up their past years of service in the Florida Retirement System, as authorized by law (or in another retirement system adopted by the city and available to its elected officials, if possible under the city's retirement system).

Legislative clarification of this matter is desirable; however, pending legislative or judicial clarification, your question is answered accordingly.