

N.D.A.G. Letter to Berg (June 3, 1985)

June 3, 1985

Colonel Brian C. Berg
Superintendent
North Dakota Highway Patrol
State Capitol
Bismarck, North Dakota 58505

Dear Colonel Berg:

Thank you for your letter of May 7, 1985. I have been informed by Assistant Attorney General Robert Bennett that he has talked with you concerning the matters set forth in that letter and that a formal opinion is not being requested but, rather, a letter to you answering your inquiries would be sufficient.

In January of 1982, Governor Olson issued Executive Order 1982-3 which transferred the administration of the Truck Regulatory Division of the Highway Department to the superintendent of the Highway Patrol. As a result of this transfer of administration, supervision of the road officers and scalehouse employees when performing their truck regulatory functions was assumed by the superintendent of the Highway Patrol.

You state in your May 7, 1985 letter to me that the scalehouse employees perform a "regulatory function" in selling permits and collecting civil overload fees. You further state that the scalehouse employees do not need to meet the same education requirements, training requirements, or age requirements as highway patrol officers.

You ask clarification as to what enforcement action, if any, the scalehouse employees can take in the performance of their duties and to clarify whether or not the scalehouse employees are subject to the North Dakota Highway Patrolmen's Retirement System or the Public Employees' Retirement System.

There apparently has been some confusion as to whether or not the Truck Regulatory Division employees are members of the North Dakota Highway Patrol. Resolution of this question will be determinative in responding to each of your inquiries.

Governor Olson's Executive Order 1982-3 directed the highway commissioner to appoint the superintendent of the Highway Patrol to be the superintendent of the Truck Regulatory Division and to appoint Highway Patrol district supervisors to be district supervisors of the Truck Regulatory Division. In addition, paragraph number 1 of that executive order states:

The Highway Commissioner, Superintendent of the Highway Patrol and the Motor Vehicle Registrar will by mutual administrative agreement effect the

transfer of the administration and operation of the Truck Regulatory Division to the superintendent and the registrar.

Only the administration and the operation of the Truck Regulatory Division has been transferred to the superintendent of the Highway Patrol. The executive order does not make the personnel of the Truck Regulatory Division "members" of the North Dakota Highway Patrol.

House Bill No. 1189 adopted by the 1983 Legislature as found as Chapter 418 of the 1983 Sessions Laws was titled "Truck Regulatory Division Transfer". However, an examination of House Bill No. 1189 fails to disclose any legislative enactment which transferred the Truck Regulatory Division to the North Dakota Highway Patrol. Rather, that act merely authorized the waiver of age requirements of personnel of Truck Regulatory Division employed as of June 30, 1983, who may desire to become a member of the North Dakota Highway Patrol and to exclude personnel of the Truck Regulatory Division transferred to the Highway Patrol after July 1, 1983, from the North Dakota Highway Patrol Retirement System.

N.D.C.C. § 39-03-03 requires the superintendent of the Highway Patrol to appoint all patrolmen. N.D.C.C §39-03-04 sets forth the qualifications of patrolmen. You have indicated that the scalehouse employees do not meet the qualifications which you and your predecessor have required to become an appointed member of the North Dakota Highway Patrol. Although House Bill No. 1189 did permit the superintendent to waive the age requirements for personnel of the Truck Regulatory Division between July 1, 1983, through June 30, 1984, this fact alone will not make members of the Truck Regulatory Division appointed members of the North Dakota Highway Patrol. These individuals must still meet the other qualifications required of appointed North Dakota Highway Patrolmen.

Scalehouse employees who are under your supervision pursuant to the executive order of 1982 are not members of the North Dakota Highway Patrol since they have not been appointed as patrolmen and do not meet the qualifications you have set for that position. These employees do not possess the law enforcement authority of a North Dakota Highway Patrolmen and are more properly classified as civilian employees who perform an administrative and regulatory function. These employees do not fit within the definitions of a police or peace officer as found in N.D.C.C. §§ 29-05-10, 39-01-01(47). These scalehouse employees are not law enforcement officers. This determination is not inconsistent with the general law enforcement powers granted to members of the North Dakota Highway Patrol. N.D.C.C. §39-03-13(1) authorizes you, as superintendent of the patrol, to organize the patrol into such divisions, bureau, and districts as you deem necessary. You may have a non-law enforcement division such as the scalehouse employees performing the administrative regulatory functions of the Truck Regulatory Division.

Since the scalehouse employees are not law enforcement officers or members of the North Dakota Highway Patrol pursuant to your appointment, these employees do not pos-

sess the powers of a law enforcement officer but, rather, only those civil regulatory powers delegated to them by you.

Your second inquiry pertains to whether or not the scalehouse employees are within the North Dakota Highway Patrol Retirement System or the Public Employee Retirement System. N.D.C.C. § 39-03.1-07 specifically excludes Truck Regulatory Division personnel transferred to the Highway Patrol after July 1, 1983, from the Highway Patrolmen Retirement System. Presumably, this would also include personnel hired after that date. You indicated to Assistant Attorney General Bennett that your inquiry on this matter pertains solely to the scalehouse employees who were employed by the Truck Regulatory Division prior to July 1, 1983.

N.D.C.C. § 39-03.1-01(3) defines a "contributor" to the Highway Patrolmen's Retirement System as "any person who is a member of the North Dakota Highway Patrol, is subject to salary reductions to support the fund, and is employed on or after July 1, 1981." As stated previously, scalehouse employees in the Truck Regulatory Division have not been appointed by you as members of the North Dakota Highway Patrol. These employees do not meet the qualifications of a Highway Patrolmen as established by you and your predecessor. Therefore, scalehouse employees who are under the supervision of the superintendent of the Highway Patrol prior to July 1, 1983, are not members of the North Dakota Highway Patrol and do not meet the definition of a "contributor" set forth in N.D.C.C. Ch. 39-03.1. scalehouse employees are more properly members of Public Employees Retirement System.

This letter should not be interpreted to mean that scalehouse employees could not become members of the North Dakota Highway Patrol in the future. If such employees otherwise meet the qualifications of patrolmen as set forth by statute and your own regulations, you could very well appoint them as members of the North Dakota Highway Patrol with the same powers and duties as all other appointed patrolmen. Should this occur, these employees who meet such qualifications and are appointed as patrolmen would then be law enforcement officers and would be required participants in the Highway Patrolmen's Retirement System.

I hope that this letter has fully answered your inquiries.

Sincerely,

Nicholas J. Spaeth

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