

OPINION  
66-301

June 13, 1966 (OPINION)

Mr. Wallace E. Warner

Securities Commissioner

RE: State - Employees Retirement System - Appointed Officials

This is in response to your request for an official opinion on the interpretation and construction of section 54-52-01(2) as created by the 1965 Legislature, which reads as follows:

DEFINITION OF TERMS. As used in this chapter, unless the context otherwise requires:

\* \* \* \*

2. 'Eligible employee' shall mean all permanent employees who meet all of the eligibility requirements set by this chapter and who are twenty-one years or more of age, and shall include appointive and elective officials at their sole election;

\* \* \* \*."

Your specific question is whether or not the chief deputy securities commissioner is an official as such term is used in the above-quoted provision of law.

Basically an official is an officer and conversely an officer is an official. Apparently what the Legislature intended to do was to make a distinction between employees and officials of the State of North Dakota. While it is recognized that the distinction between an officer and an employee is sometimes difficult to make, nevertheless certain tests have been established. These tests are not conclusive but are criteria upon which the determination can be made.

The functions, duties and services to be performed, together with the power granted and wielded, are determinative factors in clarifying the position as an "officer" or "employee." Both 67 C.J.S. under title "OFFICERS" and 42 Am. Jur., "PUBLIC OFFICERS" require the following tests in determining whether or not the position is that of an office or employment. These tests are as follows:

1. Official designation by the Legislature;
2. Delegation and possession of sovereign power;
3. Tenure and permanency of duties;
4. Creation and designation of powers and duties by law;

5. Oath or bond; and
6. Importance, dignity and independence.

Section 44-01-05 of the North Dakota Century Code provides that every civil officer shall take the oath prescribed by Section 211 of the North Dakota Constitution. Section 44-01-06 of the North Dakota Century Code requires that each state or district officer shall give a bond conditioned for the faithful and impartial discharge of the duties of his office. Chapter 44-03 requires that deputies file oaths of office and obtain the necessary bond as a condition to hold office. Section 10-04-03 pertaining to the administration of the Securities Act provides, amongst other things, that:

\* \* \* \*The commissioner shall employ from time to time such clerks and employees as are necessary for the administration of this chapter, and they shall perform such duties as the commissioner shall assign. In the absence or disability of the commissioner, his chief deputy shall administer the provisions of this chapter as acting commissioner;\* \* \* \*."

The powers and duties of the securities commissioner clearly illustrate that he is an officer of the state. His chief deputy possesses the same duties and responsibilities, except in some respects in a lesser degree. The mere fact that the chief deputy is responsible to a superior does not alter or change the classification of the position from officer to employee. The chief deputy is required to file an oath of office and to furnish a bond. He performs functions involving the sovereignty of the state.

It is therefore our opinion that the chief deputy securities commissioner is an official as such term is used in section 54-52-01(2) of the North Dakota Century Code.

HELGI JOHANNESON

Attorney General