

OPINION
66-304

March 8, 1966 (OPINION)

General James O. Guthrie

Chairman

State Employee Retirement Board

RE: State Employee Retirement Board

Your inquiry relating to many questions that have been raised as to eligibility for participation in the State Employee Retirement Plan is acknowledged.

Your first two questions involve an interpretation of subsection 2 of section 54-52-01, N.D.C.C., which reads as follows:

Eligible employees 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;"

North Dakota has no statutory definition which can be used to distinguish between state "officials" and state "employees", and therefore we must assume that the legislature intended that general rules for making such distinction would apply. The definitions in section 54-06-01, N.D.C.C., are more limited than apparently was intended to apply to the retirement act.

In the case of State v. Jorgenson, 25 N.D. 539, 142 N.W. 450, 49 LRA(NS) 67, which involved the question of whether members of the State Board of Tax Commissioners were state officers, our Supreme Court cited from two decisions from Colorado as follows:

Every officer of Colorado who holds his position by election or appointment, . . .and whose duties are defined by statute, and are in their nature continuous, and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the executive, legislative or judicial department of the government."

State officers are those whose duties concern the state at large or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign powers of the state. . .The enumeration by the state constitution of certain officers constituting the executive department of the state does not necessarily deprive the legislature of the power to create other executive officers, although it cannot abolish any of those created by the constitution."

The North Dakota Court then concluded that the tax commissioners of North Dakota were state officers. It appears therefore that for the purpose of the retirement act, an officer is one whose office was actually created by the Constitution or by statute as distinguished from an office created pursuant to authorization of statute. A state officer then would be an officer having statewide jurisdiction as distinguished from those whose jurisdiction is limited to an area less than the entire state. Although most appointive officials receive their appointment from the governor, that is not necessarily a criteria. Also state officers would not necessarily be only those from the executive branch, but would include the judicial and legislative branches.

Secondly, you asked whether elective and appointive officers must meet eligibility requirements that apply to employees, such as age, (54-52-01(2)), source of compensation (54-52-01(3)), permanence of employment (54-52-01(6)), or the existence of any other retirement plan coverage to which the state has contributed (54-52-02).

The legislature adopted entirely different language in providing for retirement plan participation by officials from the language used in providing for participation by state employees. In section 54-52-05, N.D.C.C., it clearly indicates that only eligible and permanent state employees, presumably as of the effective date of the Act, concurring in the plan, or future eligible employees, shall participate. Eligibility rules therefore apply to all employees and they may not elect not to be eligible employees. Subsection 2 of section 54-52-01, N.D.C.C., indicates that appointive and elective officials shall be eligible employees under the Act "at their sole election."

It is our conclusion that the legislature intended that the word "sole" be construed in its usual sense, that is without any other factor being involved. Hence an officer's age, source of compensation, permanence of employment, or the existence of other or duplicate retirement coverage for which the state has or is contributing, is not material and such officer is eligible to participate in the State Employee Retirement Program if he so elects.

We are therefore of the opinion that members of the legislature, judges of the North Dakota Supreme Court, and the elective or appointive holder of any other office created by the Constitution or statutes of North Dakota, may participate if they desire, subject however to the apparent intent of the legislature that present duplicate coverage was not intended, as is more specifically stated hereafter.

You have also described in your letter, five other existing retirement plans applicable to certain officials and employees of the state, to wit: (1) a retirement plan for Supreme Court and district court judges, established by Chapter 27-17, N.D.C.C., (2) Highway Patrolmen's Retirement System, established by Chapter 39-03a, N.D.C.C., (3) Teachers Insurance and Retirement, established by Chapter 15-39, N.D.C.C., (4) a retirement plan for unemployment compensation division, state employment service, and National Guard, authorized to be established by Chapter 52-11, N.D.C.C., and (5) a teachers insurance annuity, established by the Board of Higher Education.

The six specific questions that you have asked, all involve an interpretation of that part of section 54-52-02, N.D.C.C., which reads as follows:

Employees presently covered by a pension plan or retirement plan to which the state has contributed, except social security, shall not be eligible for duplicate coverage."

The title to that section, which was incorporated into the original bill, adopted by the Legislative Assembly (S.B. 164, Thirty-ninth Legislative Assembly) states:

Formulation of Plan - Exclusion of Employees Covered by Plans in Existence."

In addition, the legislature stated in the title to the Act that it was its purpose "to provide for the general welfare of state employees by authorizing the adoption by the State of North Dakota and all of its departments, boards, institutions, commissions, and agencies of a retirement plan supplementary to social security. . ."

The question as to what the legislature meant by the terms "employees covered" and "employees presently covered" is not readily answered. As that term is used in connection with insurance and retirement plans, "covered" means "protected against risk". We find nothing in the language of the Act which indicates that less than full and adequate protection was intended.

Applying principles of equity, which appears necessary in this situation to prevent injustice, and to follow the rule announced by our Supreme Court in the case of *Hummel v. Kranz*, 126 N.W.2d. 786, that although equity generally follows the law, on occasion it must walk beside the law and point out the way, we must conclude that each individual employee that now is or in the past has been a participant in a retirement plan to which the state has contributed, must make the determination for himself, considering his own individual circumstances, as to whether he is fully and adequately protected. If he determines that he is not so protected, he may participate in the retirement plan established by Chapter 54-52 N.D.C.C.

We are of the opinion, however, that the legislature intended to prohibit state funds from being used to simultaneously make payments toward more than one retirement plan, other than social security, or that an employee or officer earn benefits simultaneously in more than one plan even though the state's contribution may be delayed under any such plan until retirement.

We must assume that the legislature was aware of the existence of the other five plans, some of which require mandatory participation by certain officials and employees. With regard to any plan which does not require mandatory continued participation, voluntary termination of such participation would be sufficient to permit enrollment in the state employee retirement program.

In view of the conclusions which we have reached, we do not believe it necessary to answer each of your questions specifically.

HELGI JOHANNESON

Attorney General