

OPINION
66-308 (May 13)

May 13, 1966 (OPINION)

General James O. Guthrie

Chairman

State Employees Retirement Board

RE: State - Employees Retirement System - Forfeiture of Unvested Fun

This is in reply to your letter of April 28, 1966, relative to the State Employees Retirement System. You note the provisions of section 54-52-11 of the North Dakota Century Code, as amended, and state the following facts:

It is the consensus of this board that the law gave this board certain implied powers under section 54-52-04, subject to the limitation of this chapter, among which was the formulation of a 'plan,' using the framework of the law as a guide; therefore, it is the intention of the board to incorporate into the 'plan' a provision that an employee, four years after termination of state employment, unless again becoming a participating member of the 'plan' within that time, shall forfeit all unvested funds as of the date of original termination."

You ask for our opinion as to the legality of this action.

Section 54-52-11 of the North Dakota Century Code, as amended, provides in part:

Upon severance of the employment of a participating member, either voluntarily or involuntarily, for any reason other than set forth in this section, the contribution of the participant plus credited earnings thereon shall be vested in him. Three out of every four dollars of agency contribution shall be vested in the employee according to years of state employment including state employment prior to this chapter. The employees' vested interest in the 'vesting fund' shall be as follows:

(here follows the schedule)

An employee's one hundred percent vesting fund interest plus credited earnings thereon shall be vested, and nonforfeitable, when the employee reaches the age of sixty-five, or is permanently disabled; and an employee's one hundred percent vesting fund interest shall be vested in the beneficiary of the employee in the case of the employee's death. At the age of sixty-five, or less as may be determined by the board, all interests vested in an employee shall be available to him for payment of retirement benefits as may be provided for under this chapter. Amounts forfeited under the vesting fund

interest shall be paid into the administrative expense and benefit fund."

Section 54-52-17 of the North Dakota Century Code, as amended, provides for the formulation of a retirement plan by the State Retirement Board to include the items specified by that section "Together with such other provisions deemed advisable to the board which are not in conflict with the terms and provisions of this chapter."

We do not however believe it was the intent of the Legislature to permit the Retirement Board, or this office, to determine whether the unvested funds of a specific employee are to be forfeited after termination of state employment. There is no doubt but that the law contemplates some type of forfeiture since section 54-52-11 specifically provides that amounts forfeited under the vesting fund interest shall be paid into the administrative expense and benefit fund. However the forfeiture must be interpreted strictly against the party for whose benefit it is created. See section 9-01-15 of the North Dakota Century Code. In this instance that party would be the administrative expense and benefit fund and the participants therein. It follows, therefore, that the forfeiture provision must be constructed strictly in favor of the employee whose employment with the state has been severed. It is a general principle of law that statutes imposing forfeiture are strictly construed against the forfeiture.

The provisions of section 54-52-11 of the North Dakota Century Code, as amended, lead toward a construction which would require forfeiture of the portion of the state contribution which had not vested immediately upon severance of employment with the state. However, the statute is no explicit in this regard and in view of the strict interpretation against forfeiture, we cannot arrive at this conclusion.

As stated above, we do not believe it was the intent of the Legislature to permit the Retirement Board or this office to determine the terms of hte forfeiture. For this reason we believe this matter should be presented by the Retirement Board to the next session of the Legislative Assembly for clarifying legislation. Until this matter has been considered by the Legislature it is our opinion no forfeiture will result of any state contribution of an employee whose employment has been terminated unless such employee requests a withdrawal of the amount of the state contribution vested in him according to statute.

HELGI JOHANNESON

Attorney General